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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 681

WEYERHAEUSER STEAMSHIP COMPANY,
a Corporation,
Petitioner,

vs.

HAROLD YANOW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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HAROLD YANOW,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Weyerhaeuser Steamship Company, a corporation, prays that a writ of certiorari issue to review what purports to be a *final* order of the United States Court of Appeals, Ninth Circuit, made and entered on November 12, 1959, denying petitioner's motions to recall its mandate, vacate its opinion and judgment of Febraury 21, 1958, and dismiss the respondent's appeal.*

*All emphasis is added unless otherwise noted. All matter in brackets within quoted language is also added.

1(a): OPINIONS DELIVERED IN THE COURT OF APPEALS.

Petitioner, without any fault attributable to it, is unable to *fully* comply with Rule 23, 1(a), 1(i). The reasons are: petitioner's original motions, filed October 16, 1958; [R. pp. 226-229] and amended on October 23, 1958 [R. pp. 236-239], were granted, in toto, on November 21, 1958 [R. 203, CA Civil Docket entries]; but the incumbent clerk has certified to this Court, in effect, [R. p. 370], that *none* of the documents evidencing the judicial acts of November 21, 1958, is on file in his office. They were demanded as part of the certified record on this proceeding. [R. pp. 334, 336-338; 367-368.]

The *original* opinion dated, filed and entered on November 21, 1957, reversing the district court judgment entered on October 26, 1956 was not reported. It is printed in Appendix A, pp. 1-4; and in the record at pages 207-210. On February 21, 1958, the court ordered that its opinion and judgment of November 21, 1957 "be set aside". [R. p. 217; Appendix A, p. 5.] This order was not reported. The second opinion again reversing the judgment of the district court, was dated, filed and entered on February 21, 1958, [R. pp. 217-219; Appendix A, pp. 5-6] but it was not reported in the exact language found above the signatures of the three judges. Some person, identity unknown to petitioner, arranged and labeled the opinion as an amendment of the November 21, 1957 opinion, in the form in which it was reported in 250 F. 2d 74. [R. pp. 220-224; Appendix A, pp. 7-11.] On February 20, 1959, the original division of three judges made, filed and caused to be entered, a document labeled: "Order Vacating Order of November 21, 1958". [R. p. 343; Appendix A, p. 14.] Said "Order"

was not reported. The opinion of the court of appeals, en banc, again denying the petitioner's motions, was dated, filed and entered on November 12, 1959. [R. pp. 351-366; Appendix A, pp. 15-30.] It has not been reported yet, but will be in Vol. 272 F. 2d.

Thus copies of all *available* opinions and orders of the Court of Appeals are printed in Appendix A.

1(b): STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1(b)(i): The last order denying petitioner's motions to vacate the judgment of February 21, 1958 is dated, and was filed and entered, November 12, 1959. [R. pp. 204, 366.]

1(b)(ii): No petition for rehearing was filed with respect thereto because petitioner's counsel was absent from the United States from October 8, 1959 to December 31, 1959, and did not learn of the order until he returned to his office on January 4, 1960.

1(b)(iii): U. S. Constitution, Article III, Sections 1 and 2; 28 USC §§ 1254(1) and 2106, which latter section provides: "The Supreme Court . . . may . . . vacate, set aside or reverse *any* . . . order of a court lawfully brought before it for review . . ."

1(c): THE QUESTIONS PRESENTED FOR REVIEW.

QUESTION A: Has the court of appeals rendered a decision in conflict with decisions of other courts of appeals on the same matters; or decided important ques-

tions of federal law which have not been, but should be, settled by this Court; or decided federal questions in a way in conflict with applicable decisions of this Court; or has it so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision?

QUESTION B: Is the filing of a notice of appeal within thirty days of the entry of judgment a jurisdictional fact or is it *only* a *quasi* jurisdictional fact? In an action in which there has been a trial by jury, and judgment on the basis of a verdict was *entered* on October 25, 1956; and the face of the Transcript of Record incontrovertibly demonstrates that no timely motion for a new trial was made pursuant to Rule 59, F.R.C.P.; and no notice of appeal was filed until December 19, 1956, do the clear, concise and direct provisions of Title 28 U. S. C. §§ 2106, 2107, deprive the court of appeals of power to review or reverse said district court judgment, the district court not having made or purported to have made any order extending the time for appeal; and if, notwithstanding the provisions of said §§ 2106, 2107, the court of appeals does review and reverse said district court judgment which became final and res judicata before the notice was filed, is the judgment of the court of appeals a nullity and void; and, is it the duty of a federal court of appeals to vacate its judgment of reversal upon motion made 4 months and 20 days after its mandate has been filed and recorded in the district court? [*Carroll v. U. S.*, 354 U. S. 394, 399, 1 L. Ed. 1442, 1446.] *U.S. v. Robinson, 4 Law Ed. 2d 259.*

QUESTION C: Where at least two of the same judges who constituted the three-judge division of the court of

appeals which entered a judgment reversing the district court judgment, thereafter, on November 21, 1958, perform judicial acts—filed in the office of the clerk and entered in the Civil Docket—consisting of an *order* that a per curiam opinion be filed; a per curiam *opinion;* an Order that the mandate be recalled; that the judgment be set aside; that the opinion be vacated; that the appeal be dismissed; and that the judgment of the district court entered on October 25, 1956, remains the judgment of that court; *and* a *judgment* of the court of appeals was filed and entered; and the entire record of said court of record fails to show that *any* of said judicial acts has been *vacated* up to and including November 12, 1959, do said judicial acts of November 21, 1958, constitute res judicata and a final determination of the right of petitioner to have its said motions granted; or may the court of appeals proceed to again adjudicate the same matters or enter a subsequent order denying the motions and thus nullify the effect of the November 21, 1958, judicial acts?

QUESTION D: In the light of Article VI, Clause 2, U. S. Constitution, providing that said Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the *supreme* Law of the Land", should the plain requirements of specifically applicable provisions of the Federal Rules of Civil Procedure [prescribed by this Honorable Court pursuant to power vested in it by the Congress in the Act of June 19, 1934, Chapter 651, 48 Statutes at Large 1064 and § 2072, Title 28, USC] be *uniformly* accepted and applied by *all* district courts, and courts of appeals, in every action directly subject to such Rules; or may they be circumvented by "inter-

pretation" consisting of deleting substantial parts therefrom to suit the exigencies of each particular action or a possible propensity of particular judges to invade the rule making power of this court in order to avoid applying the Rules as they have been prescribed? [*United States v. Schaefer, etc.*, 356 U. S. 227, 228-235, 2 L. Ed. 721, 724-727.]

QUESTION E: Is an *interlocutory* judgment of a court of appeals, which reverses a district court judgment for the purpose of a new trial, *res judicata* or is it only "the law of the case" pursuant to which its effect is *limited*, in respect of future action in the same case, in the same court, to the questions specifically discussed and decided?

QUESTION F: In view of the fact that the February 21, 1958 judgment of the Court of Appeals, the same judgment which was the target of petitioner's motion to vacate, was lawfully brought before this Court [October Term, 1957, Number 845] by petition for certiorari; and the certified record as filed in said Number 845 showed upon its face that the Court of Appeals was without jurisdiction to review or reverse the District Court judgment entered on October 25, 1956, does the mere fact that this Court entered an order on April 28, 1958, [*Weyerhaeuser v. Yanow*, 356 U.S. 937, 2 L. Ed. 812] denying said petition, preclude it from entering an order vacating the said denial, granting the petition nunc pro tunc as of April 28, 1958, and remanding the case to the Court of Appeals with directions to vacate its judgment of February 21, 1958 and dismiss Yanow's appeal upon the ground that the Court of Appeals did not acquire basic jurisdiction to review or reverse the said District Court judgment;

and may such action be taken at this time in the light of Title 28 USC § 452 and the opinions of this Court in the cases of *Cannon v. U. S.*, 118 U. S. 355; *Snow v. U. S.*, 118 U. S. 346, 6 S. Ct. 1059, 1064; *U. S. v. Shotwell Manufacturing Co.*, 355 U. S. 233, 237, 2 L. Ed. 2d 234, 237; and *American Trucking Assns. v. Frisco Transportation Co.*, 358 U. S. 133, 145, 3 L. Ed. 2d 172, 180-181; notwithstanding the admitted neglect and failure of counsel for the petitioner in said October Term, 1957, Number 845, proceeding, to direct the attention of this Court to the lack of jurisdiction of the Court of Appeals?

1(d): THE CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Constitution, Article VI, Clause 2 and Amendment V. Title 18 U.S.C. § 2071; Title 28 U.S.C. §§ 43, 46, 452, 457, 711, 951, 956, 1254(1), 1291, 2071, 2072, 2106 and 2107. F.R.C.P., Rules 5, 6, 7, 59, 60, 73, and 79.

These provisions are lengthy. Their pertinent text is set forth in Appendix B.

1(e): STATEMENT OF THE CASE.

This action was commenced in the Circuit Court of Oregon and removed to the U. S. District Court, District of Oregon, by a verified petition showing diversity jurisdiction. [*Yanow v. Weyerhaeuser*, 250 F. 2d 74.] On October 25, 1956, the verdict of the jury was *recorded and filed*; and judgment on the verdict was *entered*. [R. p. 197.] On

November 5, 1956, respondent filed an ex parte motion, the *sole* object of which was to obtain "an order extending the time to and including November 20, 1956, within which to *file* a motion for a new trial." [R. p. 15] The motion does not state any ground therefor. The trial judge granted said motion; and the motion thereupon *spent its force,* if it had any. [R. p. 246.] Said extension of time, prohibited by Rule 6(b) F.R.C.P., was *void.*

On November 20, 1956, 26 days after the entry of judgment, respondent served a "Motion for a New Trial," stating with particularity the grounds therefor and setting "forth the relief or order sought", to wit: "An order setting aside the former judgment for the defendant hereinbefore entered, and granting to the plaintiff a new trial." On December 5, 1956, said motion was "denied", without comment by the District Court with respect to whether the ruling was or was not premised upon *its* lack of jurisdiction because of respondent's failure to serve his motion for a new trial "not later than 10 days after the entry of the judgment." [R. pp. 15-17.] On December 19, 1956, 55 days after entry of judgment, respondent filed a notice of appeal "from a certain judgment *entered* at Portland, Oregon on the 25th day of October, 1956 . . . and from the order denying plaintiff's motion for a new trial . . . entered at Portland, Oregon, on the 5th day of December, 1956." [R. p. 18.]

On February 21, 1958, the judgment of the District Court was reversed. [R. pp. 220-224: *Yanow v. Weyerhaeuser,* 250 F. 2d 74: Appendix A, pp. 5-11.] The *judgment* of reversal was filed and entered on February 21, 1958. [R. p. 225.] During the 1957 October term, Weyer-

haeuser filed a petition for certiorari with respect to said judgment of reversal. It was denied, April 28, 1958. [*Weyerhaeuser v. Yanow*, 356 U. S. 935; 2 L. Ed. 2d 812.] Although the lack of jurisdiction of the subject matter of the appeal appeared on the face of the record as certified and filed in said certiorari proceeding, that subject was not mentioned or called to this Court's attention in any part of the *petition* for the writ. It is suggested that this Court did not, of its own initiative, notice it. As this Court gave no reason for its ruling, it *may* have been based upon the ground that the judgment of the Court of Appeals was not a *final* determination of the action but was merely an *interlocutory* judgment. If this Court had noticed the lack of jurisdiction, it might have granted said petition and summarily vacated the judgment of the Court of Appeals. [*Mansfield, etc. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462, 464; *Stratton v. St. Louis etc. Co.*, 282 U. S. 10, 18, 75 L. Ed. 135, 149; *Land v. Dollar*, 330 U. S. 731, 734, n. 2, 91 L. Ed. 1209, 1214; *Larson v. Domestic, etc. Corp.*, 337 U. S. 682, 685, n. 3, 93 L. Ed. 1628, 1633, n. 3; and *Youngstown Sheet & Tube Co., v. Sawyer*, 343 U. S. 579, 584-585, 96 L. Ed. 1153, 1165-1166.]

On May 5, 1958, a certified copy of this Court's order denying certiorari was filed in the court of appeals and it issued its mandate. [CA. Civil Docket, R. p. 203.] On October 16, 1958, *4 months and 20 days* after the filing and recording of said mandate in the district court [D. C. Civil Docket, R. pp. 276, 277], petitioner served and filed its motions for orders to recall the said mandate, etc. [R. p. 226.],

The lower court states: "If the relief were to be granted under Rule 60(b) it *must* be applied for under the provisions of subdivision (6) [not a *ground* of the motion] of that Rule. As we hold that such application was not made within a reasonable time, the motions must be denied. IT IS SO ORDERED." [R. p. 366; Appendix A hereto, p. 30.] The lower court thought the petitioner negligently failed to act "for almost 11 months after the date of the *original* decision" on November 21, 1957 [R. p. 360, Appendix A, p. 25], and that this was an unreasonable delay [R. p. 366; Appendix A, p. 30], but a motion to recall a mandate cannot be made until after the mandate has been *filed and recorded* in the *district* court.

The motions were in writing and were made "upon the ground that the . . . Court of Appeals . . . was without *jurisdiction* by reason of the fact that notice of appeal was not filed within 30 days *of the* date when the judgment in favor of appellee was entered in the . . . District Court . . .: *and* the Court entertained and adjudicated the case upon the erroneous and inadvertent *assumption* that appellant's notice of appeal had been timely filed [in the case of *Title v. U. S.*, 263 F. 2d 28, on January 6, 1959, at the top of page 31, Judges *Barnes*, *Hamley* and Jertberg *affirmatively* so stated]: and no timely motion for a new trial was served or filed within 10 days after the entry of judgment: and the order extending the time within which appellant might file a motion for a new trial to and including November 20, 1956, was and is *void*: and *therefore*, no timely *motion for a new trial* having been served or filed, the plaintiff's

motion for a new trial was not effective as an extension of time within which he should have filed his notice of appeal.

"Said motions and each of them are based upon the ground that this Honorable Court was without jurisdiction to do anything in the above-entitled case excepting to enter an order dismissing the appeal . . ." [R. pp. 226-229; 236-267.]

The motions were heard and submitted for decision by the original division on November 12, 1958. [R. p. 279.] The lower court's Civil Docket shows that petitioner's motions were *granted* on November 21, 1958. [R. p. 203.] Unlawful attempts have been made to "line out" these Civil Docket entries, but they can still be read, and the said judicial acts constituted a final determination of the action in the court of appeals and exhausted its power in respect of said motions, unless they were subsequently *vacated* upon some ground upon which a court of record is empowered to do so.

Without, in the meantime, making or entering *any* order purporting to vacate the judicial acts of November 21, 1958, and without the slightest notice to petitioner of any intention to do so or according a right to be heard with respect to the making of any such order, the next step as disclosed by the CA Civil Docket was the filing on December 17, 1958, of a new and different opinion and order denying the motions upon the untenable ground that they had not been filed prior to the end of the term on September 30, 1958. [R. pp. 287-288; Appendix, pp. 12-13.] The next step was petitioner's petition for a rehear-

ing in respect of the opinion and order of December 17, 1958. [R. pp. 289-303; 305-307.] Between the filing of said petition and the time it was granted on March 10, 1959, petitioner's counsel became aware of the said Civil Docket entries of November 21, 1958, and made diligent and persistent attempts to see the documents and to get certified copies thereof. [R. pp. 322-333; 334-336; 337-338.] These attempts were unavailing. Finally, without any notice of the intended action of the original division and without any hearing or opportunity to oppose the contemplated action of said division it made and entered a *void* order on February 20, 1959, purporting to change the *public* record character of *one* of the judicial acts of November 21, 1958, to a "*confidential* document having no public standing" upon *the* ground that it had been "inadvertently *filed*." [R. p. 343; Appendix A, p. 14.] It was, without doubt, delivered to the custody of the clerk and it was his *absolute* duty to file it. Therefore, the act of filing it could *not* have been inadvertent.

On March 10, 1959, the two surviving judges of the original division made and entered an order granting the petition for a rehearing of petitioner's motions. [R. p. 347; Appendix A, p. 15.]

The motions were next heard by eight active Circuit Judges on June 29, 1959, and denied pursuant to an opinion and order dated, filed and entered in the Civil Docket on November 12, 1959. [R. pp. 351, 366; Appendix A, pp. 15-30.] Although the lower court *implies* that the district court judgment was merely *filed* on October 25, 1956, that court's docket entry as of that date is "*Entered* judgment on verdict." [R. p. 197.]

The action has not been set for re-trial in the district court. The Chief Judge thereof is aware of this pending petition and will take no action unless it is denied.

1(f) NOT APPLICABLE.

1(g): BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT.

The jurisdiction of the District Court was based upon diversity of citizenship and the requisite amount. [250 F. 2d 74.]

1(h): ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT, AS STATED IN THE "QUESTIONS PRESENTED FOR REVIEW".

QUESTION A:

1(a) Because petitioner's original and amended motions contained an application for an order "that the opinions rendered by this Honorable Court be *vacated*" [R. pp. 227, 237]—the motion having been filed *before* counsel had any knowledge of the existence of the judicial acts of November 21, 1958—petitioner's counsel, during the oral argument before the court of appeals en banc, on June 29, 1959, attempted to present petitioner's contentions in respect of said judicial acts; and to *prevent* the court from entering an order *vacating* said acts, by withdrawing *that* issue from the scope of the relief sought. He was summarily prevented from going

into this subject matter upon the ground that it was not within the issues. Petitioner's counsel has in his possession a transcript of the oral proceedings of June 29, 1959, prepared by a Certified Shorthand Reporter—*not* an official reporter of the court of appeals because it does not have one—and *quotes* therefrom, as apparently authorized to do so by what this Court sanctioned, during the *oral* argument, in *Norris v. Alabama*, 294 U. S. 587, 593, 79 L. Ed. 1074, 1078, footnote 1, as follows: "MR. GALLAGHER: Well, there was a judicial act performed, according to the civil docket in this very case, on November 21, 1958. The civil docket shows order per curiam [opinion] filed, filed per curiam opinion. Those motions were granted and that became a public record and I think that it was a judicial act and I don't think that we were accorded due process of law when that judicial act and the papers referring to it were removed from the files of the United States Court of Appeals' clerk. We are entitled to the benefit of that judicial act. Unless it was void, it still stands, and these motions were granted on November 21, 1958. When I came out and heard about this thing and tried to get copies of them, the clerk said that he didn't have them, and I said, 'Well, that is strange. Here are entries in the docket and I want certified copies of them.' CHIEF JUDGE POPE: What you are saying now does not bear on your motion regarding mandate. MR. GALLAGHER: But it does bear upon the fact that we have already had a decision in favor of my client by this very panel. CHIEF JUDGE POPE: I think you are now proceeding outside of the issues, Mr. Gallagher. Your time has expired." [The same transcript also shows the following:

"MR. GALLAGHER: • • • As a matter of fact, it is demonstrated on the record here that the panel did not give any consideration to jurisdiction at all. JUDGE BARNES: *There is no question about that.* That doesn't enter into it with the Court or either counsel." Judge Hamley was sitting right next to Judge Barnes and did not dispute what Judge Barnes stated.] Please see letter of petitioner's counsel, a copy of which was delivered to each of the active circuit judges who re-heard the motions on June 29, 1959, the body of which is as follows [R. p. 349]:

> "The purpose of this letter is to make certain that the Court does not assume that Weyerhaeuser Steamship Company, has made or has intended to make any motion or motions to set aside or vacate the order that a *per curiam* opinion be filed, the *per curiam* opinion or the judgment referred to and described in the entries appearing in the docket under date of November 21, 1958.
>
> In other words, Weyerhaeuser Steamship Company, a corporation, Appellee in the above entitled matter, takes the position that if any opinion, decision, order or judgment is *res judicata* or 'the law of the case', the judicial acts as described in said civil docket entries under date of November 21, 1958, are, and each thereof is, within said categories."

Contrary to the penal provisions of § 2071, Title 18, U.S.C., and of this Court's rule that "Review on writ of certiorari *shall* be sought by *filing* with the clerk, . . . a transcript of *the* record in the case, *including* the proceedings in the court whose judgment or decree is sought to be reviewed, which *shall* be certified by the clerk of the

appropriate court or courts below", there has been an attempt to frustrate and annul this Court's appellate jurisdiction, clearly vested by Article III, sections 1 and 2; Title 28 U.S.C., §§1254(1) and 2106, by telling all of us that this Court cannot review the legality of the order of November 12, 1959, in the light of the prior final determination of the same matters on November 21, 1958. This type of defiance is amazing and insupportable.

Clearly involved is petitioner's right to insist that its property rights inherent in the district court judgment entered on October 25, 1956; and the filed and entered judgment of the court of appeals that *said* "Judgment of DC entered on October 25, 1956, *remains* the Judgment of that court" are fully protected and preserved, as guaranteed to it by Amendment V, Constitution, which provides, in part, that "no person shall be deprived of his property without due process of law."

It seems to petitioner, and it so contends, that the court of appeals has therefore decided an important question of federal law, in conflict with the "Supreme Law of the Land" [Article VI, Clause 2, Constitution]; one which has not been, but should be, settled by this Court; and has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

1(b) ~~The court of appeals concedes [R. p. 354; Appendix A, p. 10] that the question of its jurisdiction of the subject matter was not raised or argued by either party; and that the point was *not* raised until 11 months *after* the filing of the *first* opinion on November 21, 1957. This is an absolutely correct statement.~~ If the point was

Petitioner withdraws from its petition all of that portion thereof on page 16 commencing with the words "The court of appeals concedes" and ending with the words "correct statement." last line of said page, and substitutes the following:

The lower court states [R. p. 354; Appendix A, p. 19] that *its* subject matter jurisdiction was not raised or argued by *either* party; and was *not* raised until eleven months *after* the filing of the *first* opinion on November 21, 1957. This is *not* a correct statement. On February 13, 1958, eight days before said court filed its opinion and judgment of February 21, 1958, appellee served and filed an "APPLICATION FOR CLARIFICATION OF OPINION AND JUDGMENT FILED NOVEMBER 21, 1957, AND SUGGESTION IN RE JURISDICTION OF THIS COURT [OF APPEALS]." This document was and is part of the record in the No. 845, October Term, 1957, certiorari proceeding [No. 845, R. 235, 239]; and the record of the pending petition for certiorari [pp. 212-216]. In said document petitioner attacked the sufficiency of the Notice of Appeal on the ground that it was not adequate to establish "Jurisdiction on Appeal"; and contended: "Therefore, the opinion filed November 21, 1957, should be *stricken* from the files; and the appeal *dismissed*."

not raised until October 16, 1958, then it could not have been raised by the court of appeals; and it could not have been decided—tacitly or otherwise. It was the positive and mandatory duty of the court of appeals to first *decide* this fundamental question [*Stratton v. St. Louis etc. Co.*, 282 U.S. 10, at p. 18, 75 L. Ed. 135, at p. 149.]

An *appellate court of record* does not consider and decide any question by overlooking or ignoring it, especially when a part of the "supreme Law of the Land", consisting of a law of the United States made in pursuance of the Constitution, [Title 28 U.S.C. §§ 2106, 2107] provides that it is powerless to do any act except to dismiss the appeal. The court below *concedes*—by way of an *assumption*—that "the record before us showed upon its face that there was *not* a timely appeal taken to this Court." [R. p. 361; Appendix A, p. 25.] This should have ended the matter as it demonstrates that the judgment of February 21, 1958 reversing the district court judgment of October 25, 1956, was absolutely void.

Petitioner directly raised the point that *said* acts of Congress rendered its judgment of February 21, 1958, null and void [R. pp. 294, 302-303], but the court below attempts to "*tacitly*" nullify the provisions of Title 28 U.S.C. §§ 2106, 2107, by its clearly insupportable decision that "the lack of timeliness of the appeal resembles a lack of diversity of citzenship in that it is an *irregularity* in the nature of a *quasi* [emphasis is by the court] jurisdictional requisite." [R. p. 359, Appendix A, p. 24.] The action of the court of appeals in *tacitly* "amending" Title 28 U.S.C. §§ 2106, 2107, amounts to an *unconstitutional* assumption of the legislative power, vested exclusively in the Congress,

pursuant to which the Congress has *prohibited* the said court from at all reviewing or reversing a district court judgment unless a notice of appeal is *filed* not later than 30 days after the entry of the judgment, with *one* exception, not here applicable, set forth in the fourth paragraph of the statute. These statutes were evidently "*too hot to handle*" as they are not even mentioned in the decision of November 12, 1959. A judgment rendered in contravention of any provision of the Constitution is *void*. [Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80, 82 L. Ed. 1188, 1195.] The decisions cited in support of this part of the decision demonstrate the prejudicial error of the court of appeals. It is undoubtedly the rule that "conditions precedent to the right of the court to proceed *after* it has *acquired* jurisdiction over the subject matter [in a United States Court of Appeals by the *timely* filing of a notice of appeal in the *district* court] and of the person are known as quasi jurisdictional facts. . . . On the making of proper *distinction* between *quasi* jurisdictional facts and *jurisdictional* facts often rests the determination of the validity of the judgment." [R. pp. 358-359, Appendix A, p. 23, footnote 8.]

The decision of this Court in *Noble v. Union River Logging Railroad*, 147 U.S. 165, cited by the court below, does not remotely support the decision that the lack of timeliness of the appeal is a quasi-jurisdictional fact. This Court there said that quasi-jurisdictional facts are those "which are necessary to be *alleged and proved* in order to set the machinery of the law in motion, but which, when properly *alleged and established* to the satisfaction of the court cannot be attacked *collaterally*. With respect to *these* facts, the *finding* of the [*trial*] court is as conclusively

presumed to be correct as its *finding* with respect to any other matter in *issue* between the parties."

The court of appeals, excepting in the exercise of *original* jurisdiction proceedings to protect its ultimate appellate jurisdiction, is not a fact-finding tribunal. There was no issue with respect to whether the notice of appeal was or was not filed in the district court on December 19, 1956, 55 days after the entry of judgment. The court of appeals was without power or jurisdiction to decide "tacitly" or otherwise, that the notice of appeal was not filed on the exact date shown on the face of the record on appeal as certified to it by the district court. If the date was not accurately stated in that record the only court vested with jurisdiction to decide such an issue was the district court.

The lower court also states that its holding is in conflict with the opinions of other courts of appeals. "Many cases have held that the appeal time provided by Rules 59(b) and 73(a) is 'mandatory and jurisdictional and cannot be extended by order of court,' Edwards v. Doctors Hospital, 2d cir., 242 F. 2d 888, 891; Howard v. Local 74, etc., 7 cir., 208 F. 2d 930, 932; Safeway Stores v. Coe, D. C. cir., 136 F. 2d 771, 774." [R. p. 357; Appendix A, p. 22.]

It is also in conflict with the decisions in the following cases: *Alaska Packers Asso. v. Pillsbury*, 301 U.S. 174, 175, 81 L. ed. 988, 989; *Mosier v. Federal Reserve Bank of New York*, 2d Cir., 132 F. 2d 710, 712; *Marten v. Hess*, 6 Cir., 176 F. 2d 834, 835; *Donovan v. Esso Shipping Co.*, 3 Cir., 259 F. 2d 65, 68; *Gunther v. Du Pont*, 4 Cir., 255

F. 2d 710, 715; and *Fine v. Paramount Pictures*, 7 Cir., 171 F. 2d 571, 574.

The opinion of the lower court is in conflict with said cases, and, even more serious, it is in *direct* conflict with the *statutes* which constitute the exclusive bases pursuant to which it could *acquire* jurisdiction to review or reverse the judgment of the district court. If the opinion of the lower court is allowed to stand it can, and probably will, create unlimited confusion, uncertainty and chaos in all future cases, at least in the Ninth Circuit, and possibly all other circuits, wherein a notice of appeal is not filed within the time specified in Title 28, U.S.C., § 2107.

This part of the decision is, therefore, within the character of the reasons which have caused the court to exercise its discretionary power by granting petitions for writs of certiorari. [Rule 19, Supreme Court Rules.] In *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 8, 95 L. Ed. 702, 706, the court stated: "As prompt, economical and sound administration of justice depends in a large degree upon definite and finally accepted principles governing important areas of jurisdiction, such as the respective jurisdictions of federal and state courts, we granted certiorari."

Petitioner respectfully suggests that the same *basic* reason is applicable to the case at bar.

QUESTION B:

Petitioner has amplified this ground in its discussion of Question A. It cites, as additional authority, the decisions of this Court referred to in the statement of Question F, supra.

QUESTION C:

This has been partially amplified in the discussion of Question A, supra. The oath required of a clerk of a court of appeals is that he "will truly and faithfully enter and record all orders, decrees, judgments and proceedings of such court, and will faithfully and impartially discharge all other duties of my office according to the best of my abilities and understanding." [Title 28 U.S.C., § 951.] "The Federal Rules of Civil Procedure, 28 U.S.C.A., whenever applicable, are hereby adopted as part of the rules of this Court." [Rule 8, 9 Cir.] "The clerk shall keep a book known as 'civil docket' . . . *All* papers filed with the clerk, . . . *all* . . . orders . . . and judgments shall be noted in the civil docket. . . . These notations shall be brief but *shall* show the *nature* of each paper filed . . . and the substance of each order or judgment of the court . . . The notation of an order or judgment shall show the date the notation is made." [Rule 79, F.R.C.P.] The clerk "shall not permit *any* original record or paper to be taken . . . from the office, without an order from *the court*, except as provided in Rule 17." [Rule 6(4), 9 Cir.] Said Rule 17 is confined to the taking of records to a *printer*. "There shall be in each circuit a *court of appeals*, which *shall* be a *court of record*, . . . Each court of appeals *shall* consist of the circuit judges of the circuit in *active* service . . ." [Title 28 U.S.C., § 43.] The *Court of Appeals* [the circuit judges of the ninth circuit in *active* service] has not at any time, in *writing* [which is the only way in which a "court of record" may make "an *order*"] made *any* order in respect of the removal of *any* original record from the clerk's office. The incumbent clerk has certified that

the record on certiorari contains every order which was, at the time of certification, "on file and appear[ed] of record in his office." [R. p. 370.] The document *labeled* "order vacating order of November 21, 1958" was and is not an order of the *court*. It was signed by a *retired* judge and 2 circuit judges in active service, Judges Barnes and Hamley. The *Court of Appeals*, pursuant to the power vested in *it* by Title 28 U.S.C., § 46 had authorized "the hearing and *determination*" of Yarow's case and controversy. No power to order the withdrawal, temporary or permanent, of the originals of any opinions, orders or judgments of a court of appeals, after they have been filed and entered in the civil docket is vested by the Congress in either the court of appeals or a division thereof. All that is authorized is that "the *court* may authorize the hearing and determination of all *cases and controversies* by separate divisions, each consisting of three judges. . . . Cases and controversies *shall* be heard and determined by a court or division of not more than three judges. . . . A majority of the number of judges authorized to constitute a court or division thereof, . . . *shall* constitute a quorum." [Title 28 U.S.C., § 46.]

The *body* of the document says absolutely nothing about vacating *any* of the judicial acts of November 21, 1958. Coming as it did, hard on the heels of the written demand of February 19, 1959, for certified copies of *all* of the originals of the public records, filed and entered in the docket, as part of a record on certiorari, it is obvious that the sole purpose of the "order" of February 20, 1959 [R. p. 343] was a *concealment* of the *text* of the judicial

acts of November 21, 1958, so that this Court would never have an opportunity of examining them. The "order" of February 20, 1959, was and is against public policy and is *void* for that reason alone. Even the total of all the circuit judges in active service are without a scintilla of power to make such an order. [Title 18 U.S.C., § 2071.]

Having in mind his oath and duty as an officer of this Court, the undersigned counsel for petitioner represents to this Court that on January 18, 1960, after he had orally requested a *photostatic* copy of the docket entries so that this Court could see the prior, but practically ineffective, efforts to obliterate the said docket entries, a further and more effective attempt at obliteration was made. This does not show up very clearly on the black background photostatic copy [R. p. 203] but counsel for petitioner has a white background copy which does show it.

The Court of Appeals, en banc, has actual knowledge of the removal of the documents involved in the judicial acts of November 21, 1958, from the custody of the clerk. It has done nothing to bring them out of concealment. Is this inaction compelled by their actual knowledge that said documents were in all respects deliberate judicial acts and were res judicata in respect of the lower court's lack of jurisdiction?

Two of the incumbent judges have actual knowledge of the verbatim text of the judicial acts of November 21, 1958, because they took an active part in them. If the documents filed and entered on November 21, 1958, were not signed, knowingly and deliberately, by each of them, there would be no need to conceal them.

Paul P. O'Brien, Esq., has been a member of the bar of this Court for many years. Petitioner suggests that this Court can take judicial notice of the fact that he is a most competent lawyer and particularly skilled in what is required to appear before he would be justified in describing a document as a *per curiam* opinion, order or judgment. It is also a presumption of law, controlling until controverted by competent *evidence*, that he did, no more nor less than comply with his oath [28 U.S.C., § 951] and his duty as prescribed in Rule 79, F.R.C.P. Therefore, the November 21, 1958 docket entries are sufficient in and of themselves to demonstrate that this case and controversy was finally and conclusively *determined and terminated* in respect of the lawful exercise of judicial functions by the court of appeals on *that* date; and that the subsequent order of November 12, 1959 was either absolutely void or a prejudicial error.

QUESTION D:

This point involves the integrity, scope and effect of the F.R.C.P. in respect of motions for a new trial, in so far as they provide for a termination of the running of time within which a notice of appeal must be filed.

The lower court holds that although the motion for an extension of time to file a motion for a new trial "was so defective that it could not properly be granted" [because it was totally insufficient to vest the district court with jurisdiction], the "formal motion for a new trial of November 20, 1956 . . . may be . . . idered an attempted amendment or enlargement of the earlier motion. . . ." This *means* that when the formal motion was denied on December 5, 1956, this was the date of denial from *which* time

the 30 days would be computed, making the December 17, 1956 notice of appeal a timely one. [R. pp. 364-365; Appendix A, pp. 28-29.]

In view of the axiomatic proposition that the power of a court of appeals to review or reverse a district court judgment is absolutely dependent upon the filing of a notice of appeal not later than thirty days from the date when the district court performs the last judicial act which is a *final* decision [Title 28 U.S.C. §§ 1291, 2107] and exhausts the power of that court to set the judgment aside, it must be the law that unless the district court is lawfully vested with jurisdiction to *grant* a new trial in an action where there has been a trial by jury there is no termination of the jurisdictional requisite that a notice of appeal must be filed not later than thirty days after the entry of the district court judgment. A district court is *not* vested with jurisdiction to grant such motion upon the application of a party unless an actual motion for a new trial is served not later than 10 days after the entry of the judgment. The full extent of its power to do anything in respect of this subject flows from Rules 7(1)(a), 6(b); 59(a), (b), F.R.C.P.

It is axiomatic that the jurisdiction of the court of appeals to review, *on the merits*, any judgment, decree or order of a district court depends upon the existence of jurisdiction vested in said court to make or enter the particular judgment, decree or order involved. Of course, an appeal may be taken from the entry by the district court of a *void* judgment, decree or order; but in such case the only proper exercise of the appellate court's function is to render a judgment pursuant to which the

district court is directed to *vacate* the void judicial act. [*Stratton v. St. Louis etc. Co.*, 282 U.S. 10, 18, 75 L. Ed. 135, 149.] The fact that the district court "denied" the respondent's motion for a new trial instead of dismissing the proceeding upon the specific ground that it was without jurisdiction to consider the application on its merits does not convert the order denying the motion for a new trial into a decision which affected the finality of the judgment in the slightest degree. [*Safeway Stores v. Coe*, 136 F. 2d 771, 775; headnotes 8, 9; *Edwards v. Doctors Hospital*, 242 F. 2d 888, 890, 891, headnotes 1, 2, 3; *Edward's* petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, denied, April 14, 1958, 356 U.S. 929, 2 L. Ed. 2d 760.]

It cannot be lightly assumed that this Court prescribed these rules for the purpose of having them disobeyed or emasculated by the lower courts or the bar. The Act of June 19, 1934, Chapter 651, 48 Statutes at Large 1064 and its successor, Title 28 U.S.C. 2072, provide that such rules shall not abridge, enlarge or modify any substantive right, such as the integrity of a final judgment on the merits. Therefore, this Court must have intended that the rules mean what they say and that they cannot be amended by "interpretation" so as to abridge the substantive and constitutional [Amendment V, "due process of law" provision] right of a party in whose favor a judgment on the merits has been entered in a district court, vested with party and subject-matter jurisdiction, to insist upon the unassailable integrity of such judgment when the time within which the trial judge might grant a motion for a new trial and the time when a no-

tice of appeal to a court of appeals *must* be filed have expired.

In order to constitute a motion for a new trial in an action where there has been a trial by jury, the application must be in writing and it "*shall* state with *particularity* the grounds therefor"; [Rule 7(b)(1); 7(b)(2)] which, in respect of the grounds upon which a new trial may be granted as authorized by Rule 59(a) F.R.C.P., consist of "any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States"; and the written motion *shall* also "set forth the relief or order sought", which is that the trial judge make an order granting a new trial. A written motion for a new trial, at least substantially in the form required by Rule 7(b)(1) "*shall* be served not later than 10 days after the entry of the judgment.", as required by Rule 59(b), F.R.C.P. The *only* document served within the ten day period was an ex parte motion for an order extending time to "file" [sic] a motion for a new trial. If it had been an application for an extension of time with respect to *serving* a motion for a new trial under Rule 59(b), the district court would have been without power to grant it. [Rule 6(b) F.R.C.P.] It is obvious that respondent did not intend said motion, served by mail on November 2, 1956, and presented ex-parte on November 5, 1956, to be a motion for a new trial. "A written motion, other than one which may be heard ex-parte *shall* be served not later than 5 days before the time *specified* for the hearing, unless a different period is fixed by these rules or order of the court. . . . Whenever a party has the right or is required to

do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period." [Rule 6(d), (e), F.R.C.P.]

Although the lower court states that its discussion of the effect [as the equivalent of a motion for a new trial] of the motion for an extension of time within which to file a motion for a new trial is "unnecessary to this decision", the record demonstrates that said question of law was one of the fundamental issues in the case, because of the provisions of Rule 73(a), F.R.C.P., that "the running of the time for appeal is terminated by a *timely* motion made *pursuant* to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a *timely* motion under *such* rules: . . . denying a motion for a new trial under Rule 59."

Petitioner's written motion states as follows: " . . .; and the order extending the time within which appellant might file a motion for a new trial to and including November 20, 1956, was and is *void;* and therefore, no timely motion for a new trial having been served or filed, the plaintiff's motion for a new trial was not effective as an *extension* of the time within which he should have filed his notice of appeal." [R. pp. 228-229; 238-239.]

The ultimate ruling of the lower court is the "motions must be denied. IT IS SO ORDERED." [R. p. 366; Appendix A, p. 30.] In order to so rule, the lower court was *required* to hold, directly or indirectly, that the motion of

November 5, 1956, was and is a motion for a new trial, in accordance with the applicable rules.

The part of the opinion with respect to this important issue of law, [commencing with "What we have said", R. p. 361; Appendix A, p. 26 to and including "notice of appeal was a timely one" R. p. 365, Appendix A, p. 29] as raised by the specific ground of the motion, is therefore an actual decision that a document in the form of the ex-parte motion of November 5, 1956, was and is, for this and all future cases, a motion for a new trial complying in all substantial respects with the requirements of F.R.C.P. Rules 7(b)(1); 59(a), (b); and 73(a); and that a *jurisdictionally* defective "motion for a new trial" may be *amended* 26 days after entry of judgment, thus *nullifying* Rule 6(b), F.R.C.P.

The lower court states the existence of conflicts. "We note that there are cases which disagree with those decisions, as for instance, Fine v. Paramount Pictures, 7 cir., 181 F. 2d 300." [R. p. 365, footnote 15; Appendix A, p. 29.]

The actual *serving* of a motion for a new trial which complies with the requirements of 7(b)(1) and 59(a), not later than 10 days after the entry of the judgment, is a jurisdictional requisite and condition precedent to the extension of the time to file a notice of appeal.

The lower court states that this Court would not have granted certiorari "had it not been satisfied with the jurisdiction of the court of appeals" in *Jordan v. United States District Court*, 352 U. S. 904. [R. p. 362, footnote 11; Appendix A, p. 27.] If that assumption is correct, this Court would have *reversed* instead of *vacating* the judicial

acts of the Court of Appeals, District of Columbia Circuit. The lower court also says that the requirement of Rule 73(a), that "A party may appeal from a judgment by *filing* with the *district* court a *notice of appeal*" means *nothing;* and that *any* papers are effective as notices of appeal, even though they "do not use the word 'appeal', are *filed* in the *wrong* court, or *otherwise* fail strictly [or at all] to conform to the language of the rules." [R. p. 363; Appendix A, p. 28.]

These are important federal questions involving *every* litigant in the district courts. The lower court has annulled or emasculated *every* statute and rule [F.R.C.P.] with respect to motions for a new trial [R. pp. 361, 365; Appendix A, pp. 26-30] and an appeal. All actions result in a judgment one way or the other. The Rules of Civil Procedure must have a *uniform* application in *all* "inferior" federal courts. Anything else will result in a chaotic lack of uniformity in the practical administration thereof. The law provides that the F.R.C.P. "shall not abridge, enlarge or modify any substantive right . . ." [Title 28 U.S.C. §2072.] If all or any federal courts are permitted to destroy the basic requirements of Rules 6(b); 7(b)(1); 59(a)(b); and 73(a), they may as well be erased from the law. But, as this Court has the sole power to prescribe the rules, it is suggested that it also has the duty to see that they are complied with *as prescribed.*

QUESTION E:

The Court of Appeals states: 'Since the question of this court's jurisdiction of the appeal was thus an issue in the case, the *reversal* of the judgment below was a tacit determination of the court's jurisdiction and a *final*

adjudication of that issue. If this final adjudication was erroneous, it was subject to correction upon review in a higher court, or upon rehearing in this court. But such a judgment, whether erroneous or not, becomes res judicata." [R. p. 354; Appendix A, p. 19.]

If this is a correct statement of the law, then in *every* case where a Court of Appeals actually purports to review and reverse a judgment of a district court which has become final and res judicata before a notice of appeal is filed, the mere fact of such adjudication will render the resulting "judgment" immune from attack upon the ground that it was a nullity and void, except upon review in a higher court or a formal petition for a rehearing. Thus, no judgment of any court of appeals would be subject to a *motion* to vacate it upon that ground.

None of the decisions of this Court, cited in support of this part of the decision supports it. None involved a case where an *interlocutory* judgment of an appellate court was the subject of *direct* attack, in the very court which rendered it, upon the ground that the face of the record conclusively established that the court was without jurisdiction of the subject matter. The decision in *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25, 61 L. Ed 966 did not involve any such issue. Petitioner quotes therefrom as follows:

> "This is a suit in Illinois upon a judgment recovered in Tennessee against the Insurance Companies, plaintiffs in error. They pleaded and set up at the trial that there never was a valid service upon them in Tennessee and that the judgment was void. The defendant in error (the plaintiff) showed in reply, without dispute, that the defense was urged

in Tennessee by pleas in abatement; that, upon demurrer to one plea and upon issue joined on the other, the decision was for the plaintiff; and that the judgment was affirmed by the higher courts. The plaintiff had judgment at the trial in Illinois, the judgment was affirmed by the appellate court, and a writ of certiorari was denied by the supreme court of that state. The Insurance Companies say that the present judgment deprives them of their property without due process of law. Other sections of the Constitution are referred to in the assignments of error, but they have no bearing upon the case.

"The ground upon which the present judgment was sustained by the appellate court was that, as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case, it could not be reopened in this suit. The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction.

"A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction [in personam; added by petitioner] over that *defendant*. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power (*Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897), even where its power depends upon a fact and it finds the fact (*Tilt v. Kelsey*, 207 U. S. 43, 51, 52 L. Ed. 95, 99, 28 Sup. Ct. Rep. 1). A divorce might be held void for want of jurisdiction although the libellee had appeared in the cause. Andrews v. Andrews, 188 U. S. 14, 16, 17, 38, 47 L. Ed. 366, 367, 372, 23 Sup. Ct. Rep. 237." [*Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25, 28-29, 61 L. Ed. 966, 969.]

This demonstrates the danger of copying and relying upon an isolated statement in a decision, lifted out of its context, and applying it to an entirely different question of law.

The Court of Appeals also failed to notice the clear distinction between the doctrine of res judicata and the rule of "the law of the case" in respect of judgments of an *appellate* court. This Court stated the rule as follows:

> ". . . the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case." [*Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 48 L. Ed. 788.]

The Court of Appeals, 9 Cir., citing the *Mutual* and *other decisions* of this Court in support thereof, stated the rule as follows:

> "The rule of res judicata, . . . , applies in a situation where a *second* action is on the same cause of action and between the same parties as a *first* action: it does not apply where a controversy on appeal has not been concluded and no second action is being brought, but where there has been a reversal and remand for further proceedings in the same litigation. The latter was the situation in the instant case. The principle here applicable is that a judgment of reversal by an appellate court is an adjudication only of matters expressly discussed and decided, which become the law of the case in further proceedings on remand and re-appeal." [*Hansen and Rowland v. C. F. Lytle Co.*, 167 F. 2d 998, 999.]

This last mentioned decision of the lower court was directly brought to its attention. [R. p. 303.]

These decisions, and many others which could be cited, are sound declarations of the actual rule. The conflict is obvious.

QUESTION F:

This question does not seem to require amplification, except to point out that the printed "Transcript of Record" did *not* contain the motion for an extension of time to *file* a motion for new trial, or the affidavit of Nels Peterson, Esq.

CONCLUSION AND PRAYER.

Wherefore, petitioner respectfully prays as follows:

A. (1) That the order of April 28, 1958 denying certiorari be vacated; (2) That an order be entered, nunc pro tunc, granting the petition for a writ of certiorari filed in case 845, October 1957 term; or

B. That an order be now made directing the Court of Appeals to forthwith deliver to the clerk of said court the originals of all documents referred to in the Civil Docket entries of November 21, 1958 in the exact condition in which they were at the time they were filed and entered; and

C. If said court informs this Court that the originals of said documents have or any thereof has been destroyed or lost or misplaced, that this Court issue subpoenas pursuant to which the depositions of the Honorable Stanley N. Barnes and the Honorable Frederick G. Hamley and

Paul P. O'Brien, Esq., may be taken by petitioner at San Francisco, California, for the purpose of ascertaining whether both or only one of said active circuit judges knowingly signed the documents, the description and substance of which are noted in said docket entries, before they were filed and entered therein; or

D. That this petition for a writ of certiorari be gra. 1; or

E. For such other or different relief, if any, to which petitioner may be lawfully entitled in order to protect its substantial rights, if any, as to this Court may seem justified.

Dated, San Francisco, California,
February 2, 1960.

Respectfully submitted,

LASHER B. GALLAGHER,
Counsel for Petitioner.

(Appendices A and B Follow.)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD YANOW, *Appellant*, vs. WEYERHAEUSER STEAMSHIP COMPANY, a corporation, *Appellee.*	No. 15,452 Nov. 21, 1957

Appeal from the United States District Court for the District of Oregon

Before: DENMAN, Senior Circuit Judge and BARNES and HAMLEY, Circuit Judges

DENMAN, Senior Circuit Judge:

Yanow appeals from a judgment in a jury-tried case holding that the steamship company is not liable for injuries he alleged he received by slipping on grease on the deck of the steamship company's steamship, the W. H. PEABODY.

The evidence shows that Yanow was working as a longshoreman at Coos Bay, Oregon, on August 1, 1954, aboard appellee's vessel the W. H. PEABODY, a 10,000 ton Liberty Ship. The gang he was working with was engaged in stowing the deck load of lumber at No. 2 hatch. This involved moving loads of lumber on rollers into position where the men were working to build up the level of the "floor". A load of lumber had just been landed and appellant needed a peavey to facilitate his work. He went to get one behind the No. 2 port winch and there is strong testimony, if it be believed, that as he walked by the winch he slipped on a "blob of grease" and fell, striking his back on part of the winch on the way down.

As a result of this fall, there is evidence that the appellant aggravated a previous back condition and sustained a bruised back, a bumped head, and had the wind knocked out of him.

There was no direct proof of how the grease got on the deck near the winch, but it might be inferred from the evidence that it came from lubrication of the winch or from a coiled wire fall which was on the deck between the winch and the deckhouse.

There is no question that there was evidence warranting a verdict for Yanow for it is now a long established law that a shipowner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the shipowner has no knowledge of the presence of the oil or grease. The Osceola, 189 U.S. 158; Seas Shipping Co. v. Sieracki, 328 U.S. 25.

Yanow contends that two erroneous instructions given and a refusal to give a requested instruction so prejudiced his case with the jury that he is entitled to a new trial.

The first instruction complained of is obviously wrong since Yanow's contention was that unseaworthiness could create liability without "fault of anyone." It is:

> "Just because an accident happened does not mean that, under the rules of law, there is any liability upon the Weyerhaeuser Steamship Company. In other words, the mere happening of an accident does not entitle the plaintiff to prevail in the absence of a breach of duty on the part of the defendant which caused or contributed to the injuries which plaintiff sustained. There are such things as unavoidable accidents—*accidents which happen without the fault of anyone*—and if you determine that such is the case here, *then your deliberations will be at an end*, and your verdict must be for the defendant even though the plaintiff was injured." (Emphasis added.)

After this instruction on unavoidable accident had been given to the jury, the attorneys repaired to the court's chambers where the following occurred:

> "Mr. Peterson: Plaintiff excepts to the court's instruction to the jury, in substance, that if this was an unavoidable accident the plaintiff cannot recover. The point of my exception is that the unavoidable accident instruction in this kind of a situation is completely beside any issue in the case.
>
> "The Court: Is that true? Do you think that unavoidable accident should be given?

"Mr. Lister: Well, your Honor, I think as part of it that, technically, unavoidable accident would be the terminology, but I don't see the point you are making.

"The Court: I am just asking; and if you want to delete it, I will delete it.

"Mr. Lister: No.

"The Court: Very well."

Pertinent to this instruction are the facts that the trial occupied the whole day. The transcript shows that the case went to the jury late in the afternoon after 104 pages of testimony had been given and 20 exhibits introduced since the luncheon recess, 62 pages being of complicated opposing expert evidence by physicians describing the extent of Yanow's injuries, a matter relative to the amount of his damages. The wrongful opening instruction was followed by instruction covering the extent of 12 pages of the printed transcript.

In this situation the statement "then your deliberations will be at an end" gave an easy out for the jurors to escape from the possibility of being locked up for the night and the certainty of a long session over the evidence of damages, if they were forced to consider the evidence of the cause thereof.

With the insistence of the shipowner that the instruction must be given over the objection of Yanow, we hold that the effect of this instruction was not cured by other statements in the instructions.

Since the case may be retried and it is likely that the same questions may arise as to the plaintiff's refused instruction and the other instruction excepted to, they are here considered. The court gave the following instructions:

"You have heard the testimony and the other evidence, and I leave it to you to determine whether plaintiff has proved by a preponderance of the evidence that oil and grease were permitted to collect on the deck forward of the port winch at No. 2 hatch and whether the quantity of oil and grease, if any, that was permitted to collect rendered the vessel unseaworthy."

The Court refused appellant's requested instruction No. 6:

Requested Instruction No. 6.

"In this case if you find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2,

or that the topping lift wire for the port boom at Hatch No. 2 was not kept secured, then you will find the steamship SS W. H. Peabody unseaworthy. If you further find that plaintiff was injured as a proximate and contributing result of the unseaworthiness of the vessel, then your verdict will be in favor of the plaintiff and against the defendant corporation."

Counsel for appellant made his objection as follows:

"Plaintiff further excepts to the Court's failure to give Plaintiff's Requested Instruction No. 6, which is an instruction that if they find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2, and I have also put in there that if they find that the topping lift wire for the port boom at Hatch No. 2 was not kept secured, then they are to find the steamship SS W. H. Peabody unseaworthy.

"The plaintiff excepts to the Court's failure to instruct the jury either as to the grease and oil on the deck or the unsecured topping lift."

So far as concerns the topping lift wire the court properly stated that it was not shown to have contributed to the injury to Yanow. The sentence, "In this case if you find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2 . . . then you will find the Steamship SS W. H. Peabody unseaworthy" does not state the law since under this sentence any amount of grease, however slight would constitute unseaworthiness. The court's instruction quoted above is properly based on "the quantity of oil and grease."

The judgment is reversed.

(Endorsed:) Opinion. Filed Nov. 21, 1957.

Paul O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD YANOW, *Appellant,* vs. WEYERHAEUSER STEAMSHIP COMPANY, a corporation, *Appellee.*	No. 15,452

Before: DENMAN, BARNES and HAMLEY, Circuit Judges

DENMAN, Circuit Judge:

IT IS ORDERED that our opinion of November 21, 1957 and the judgment therein be set aside and the following opinion and its decision be filed.

This case was transferred from the Circuit Court of the State of Oregon, County of Multonomah, of Oregon on the verified petition of the Weyerhaeuser Steamship Company, of which we take judicial notice, alleging as follows:

"At all times during July, 1954, and at all times since then defendant was and now is a corporation organized and existing exclusively pursuant to the laws of the State of Delaware, and on July 31, 1954, petitioner was and at all times since has been and now is exclusively a citizen of the State of Delaware. Petitioner was not at any time hereinabove mentioned nor is it now a citizen of the State of Oregon.

"That at all times hereinabove mentioned plaintiff, Harold Yanow, was and now is a citizen and resident of and domiciled in the State of Oregon."

Plaintiff Yanow appeared and moved for a jury trial thereby accepting as true the allegations creating the diversity jurisdiction.

He appeals from a judgment in which the verdict held the steamship company not to be liable for injuries he alleged

he received by slipping on grease on the deck of the steamship company's steamship, the W. H. Peabody. He complied with Fed. R. Civ. P. 75(d) in stating his points on appeal.

It is further ordered that the remainder of our opinion is that of November 21, 1957, after the first paragraph thereof save that the last sentence of the paragraph beginning second on page two is amended to read as follows: "The liability exists although the shipowner has no knowledge of the presence of the oil or grease. The Osceola, 189 U.S. 158; Seas Shipping Co. v. Sieracki, 328 U.S. 85; Boudoin v. Lykes Bros. SS Co., 348 U.S. 336, 340. Since Yanow was injured on the ship on navigable waters, his rights are determined by maritime and not state law. Pope and Talbot v. Hawn, 346 U.S. 406, 409."[1]

As above provided, the opinion is to be printed in full and judgment entered thereon.

/s/ William Denman
/s/ Stanley N. Barnes
/s/ Frederick G. Hamley
Circuit Judges

(Endorsed) Filed
February 21, 1958
Paul P. O'Brien, Clerk

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[1] In the recent case of Kernan v. American Dredging Co., ... U.S. ..., No. 34, decided February 3, 1958, the court declined to pass on the contention that unseaworthiness causing the **death** of a seaman creates liability in the ship or owners, four of the dissenting judges stating that such unseaworthiness created no liability for **death**. Eight of the justices in the Boudoin case sat in the Kernan case. No mention is made of the Osceola, Sieracki and Boudoin cases recognizing such liability for **personal** injury of the seaman and stevedore. We do not regard the Kernan decision on the liability for death as affecting the Supreme Court cases recognizing the liability for personal injury from unseaworthiness.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD YANOW, *Appellant*, vs. WEYERHAEUSER STEAMSHIP COMPANY, a corporation, *Appellee*.	No. 15,452 Nov. 21, 1957 as amended Feb. 21, 1958

Appeal from the United States District Court for the District of Oregon

Before: DENMAN, Senior Circuit Judge and BARNES and HAMLEY, Circuit Judges

DENMAN, Senior Circuit Judge:

This case was transferred from the Circuit Court of the State of Oregon, County of Multnomah, to the United States District Court for the State of Oregon on the verified petition of the Weyerhaeuser Steamship Company, of which we take judicial notice, alleging as follows:

> "At all times during July, 1954, and at all times since then defendant was and now is a corporation organized and existing exclusively pursuant to the laws of the State of Delaware and on July 31, 1954, petitioner was and at all times since has been and now is exclusively a citizen of the State of Delaware. Petitioner was not at any time hereinabove mentioned nor is it now a citizen of the State of Oregon.
>
> "That at all times hereinabove mentioned plaintiff, Harold Yanow, was and now is a citizen and resident of and domiciled in the State of Oregon."

Plaintiff Yanow appeared and moved for a jury trial thereby accepting as true the allegations creating the diversity jurisdiction.

He appeals from a judgment in which the verdict held the steamship company not to be liable for injuries he alleged he received by slipping on grease on the deck of the steamship company's steamship, the W. H. PEABODY. He complied with Fed. R. Civ. P. 75(d) in stating his points on appeal.

The evidence shows that Yanow was working as a longshoreman at Coos Bay, Oregon, on August 1, 1954, aboard appellee's vessel the W. H. PEABODY, a 10,000 ton Liberty Ship. The gang he was working with was engaged in stowing the deck load of lumber at No. 2 hatch. This involved moving loads of lumber on rollers into position where the men were working to build up the level of the "floor". A load of lumber had just been landed and appellant needed a peavey to facilitate his work. He went to get one behind the No. 2 port winch and there is strong testimony, if it be believed, that, as he walked by the winch he slipped on a "blob of grease" and fell, striking his back on part of the winch on the way down.

As a result of this fall, there is evidence that the appellant aggravated a previous back condition and sustained a bruised back, a bumped head, and had the wind knocked out of him.

There was no direct proof of how the grease got on the deck near the winch, but it might be inferred from the evidence that it came from lubrication of the winch or from a coiled wire fall which was on the deck between the winch and the deckhouse.

There is no question that there was evidence warranting a verdict for Yanow for it is now a long established law that a shipowner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the shipowner has no knowledge of the presence of the oil or grease. The Osceola, 189 U.S. 158; Seas Shipping Co. v. Sieracki, 328 U.S. 85; Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 340. Since Yanow was injured on the ship on navigable waters, his rights are determined by maritime and not state law. Pope and Talbot v. Hawn, 346 U.S. 406, 409.[1]

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[1] In the recent case of Kerman v. American Dredging Co., ___ U.S. ___, No. 34, decided February 3, 1958 the court declined to pass on the contention that unseaworthiness causing the death of a seaman creates

Yanow contends that two erroneous instructions given and a refusal to give a requested instruction so prejudiced his case with the jury that he is entitled to a new trial.

The first instruction complained of is obviously wrong since Yanow's contention was that unseaworthiness could create liability without "fault of anyone." It is:

> "Just because an accident happened does not mean that, under the rules of law, there is any liability upon the Weyerhaeuser Steamship Company. In other words, the mere happening of an accident does not entitle the plaintiff to prevail in the absence of a breach of duty on the part of the defendant which caused or contributed to the injuries which plaintiff sustained. There are such things as unavoidable accidents—*accidents which happen without the fault of anyone*—and if you determine that such is the case here, *then your deliberations will be at an end*, and your verdict must be for the defendant even though the plaintiff was injured." [Emphasis added.]

After this instruction on unavoidable accident had been given to the jury, the attorneys repaired to the court's chambers where the following occurred:

> "Mr. Peterson: Plaintiff excepts to the court's instruction to the jury, in substance, that if this was an unavoidable accident the plaintiff cannot recover. The point of my exception is that the unavoidable accident instruction in this kind of a situation is completely beside any issue in the case.
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> "The Court: Is that true? Do you think that unavoidable accident should be given?
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> "Mr. Lister: Well, your Honor, I think as a part of it that, technically, unavoidable accident would be the terminology, but I don't see the point you are making.

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liability in the ship or owners, four of the dissenting judges stating that such unseaworthiness created no liability for **death**. Eight of the justices in the Boudoin case sat in the Kernan case. No mention is made of The Osceola, Sieracki and Boudoin cases recognizing such liability for **personal injury** of the seaman and stevedore. We do not regard the Kernan decision on the liability for death as affecting the Supreme Court cases recognizing the liability for personal injury from unseaworthiness.

"The Court: I am just asking: and if you want to delete it I will delete it.

"Mr. Lister: No.

"The Court: Very well."

Pertinent to this instruction are the facts that the trial occupied the whole day. The transcript shows that the case went to the jury late in the afternoon after 104 pages of testimony had been given and 20 exhibits introduced since the luncheon recess, 62 pages being of complicated opposing expert evidence by physicians describing the extent of Yanow's injuries, a matter relative to the amount of his damages. The wrongful opening instruction was followed by instruction covering the extent of 12 pages of the printed transcript.

In this situation the statement "then your deliberations will be at an end" gave an easy out for the jurors to escape from the possibility of being locked up for the night and the certainty of a long session over the evidence of damages, if they were forced to consider the evidence of the cause thereof.

With the insistence of the shipowner that the instruction must be given over the objection of Yanow, we hold that the effect of this instruction was not cured by other statements in the instructions.

Since the case may be retried and it is likely that the same questions may arise as to the plaintiff's refused instruction and the other instruction excepted to, they are here considered. The court gave the following instructions:

"You have heard the testimony and the other evidence, and I leave it to you to determine whether plaintiff has proved by a preponderance of the evidence that oil and grease were permitted to collect on the deck forward of the port winch at No. 2 hatch and whether the quantity of oil and grease, if any, that was permitted to collect rendered the vessel unseaworthy."

The Court refused appellant's requested instruction No. 6:

Requested Instruction No. 6.

"In this case if you find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2 or that the topping lift wire for the port boom at Hatch No.

2 was not kept secured, then you will find the steamshipp SS W. H. Peabody unseaworthy. If you further find that plaintiff was injured as a proximate and contributing result of the unseaworthiness of the vessel, then your verdict will be in favor of the plaintiff and against the defendant corporation."

Counsel for appellant made his objections as follows:

"Plaintiff further excepts to the Court's failure to give Plaintiff's Requested Instruction No. 6, which is an instruction that if they find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2, and I have also put in there that if they find that the topping lift wire for the port boom at Hatch No. 2 was not kept secured, then they are to find the steamship SS W. H. Peabody unseaworthy.

"The plaintiff excepts to the Court's failure to instruct the jury, either as to the grease and oil on the deck or the unsecured topping lift."

So far as concerns the topping lift wire the court properly stated that it was not shown to have contributed to the injury to Yanow. The sentence, "In this case if you find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2 . . . then you will find the Steamship SS W. H. Peabody unseaworthy" does not state the law since under this sentence any amount of grease however slight would constitute unseaworthiness. The court's instruction quoted above is properly based on "the quantity of oil and grease."

The judgment is reversed.

(Endorsed) Opinion. Filed Nov. 21, 1957 as amended by order of Feb. 21, 1958.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD YANOW,

Appellant,

vs.

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Appellee.

No. 15,452

Dec. 17, 1958

Before: DENMAN, Senior Circuit Judge and BARNES and HAMLEY, Circuit Judges

DENMAN, Senior Circuit Judge:

Appellee, Weyerhaeuser Steamship Company, contending this court to be without jurisdiction because the notice of appeal was filed too late, moved on October 16, 1958:

1. That the mandate heretofore issued be recalled.

2. That the opinions rendered by this court be vacated;

3. That our judgment of November 21, 1957, as amended February 21, 1958 in our San Francisco term ending September 30, 1958, pursuant to which the judgment of the United States District Court for the District of Oregon in favor of appellee and against appellant was reversed, be vacated.

The ground of the steamship company's motion is that the judgment of the District Court from which the appeal was taken was entered on October 25, 1956; that by an error of the District Court in extending the time to move for a new trial in violation of F.R.Civ.P. 59(b) and 6(b), the notice of appeal was not filed within the thirty days required by F.R.Civ.P. 73(a), nor until December 19, 1956, fifty-five days after the entry of the judgment; and hence this court had no jurisdiction over the case.

Yanow contends that assuming such lack of jurisdiction exists we are not empowered to consider the motion to set aside our judgment of February 21, 1958, which became final by the denial of certiorari on April 28, 1958, since the motion was not made in

our then San Francisco term of court ending on September 30, 1958, in which our judgment was entered, but on October 16, 1958, sixteen days after the term had ended. Cf. our Rule 3.

We think the motion was filed too late for our consideration. The Supreme Court has held in many cases that such a motion cannot be considered after the term in which the judgment becomes final. Bank of United States v. Moss, 6 How. 30; Noonan v. Bradley, 79 U.S. 121; Bronson v. Schulten, 104 U.S. 410; Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U.S. 552; In re: Metropolitan Trust Co., 218 U.S. 312. The question was fully discussed in our opinion in O. F. Nelson & Co. v. United States, 169 F.2d 833.

The motion is denied.

(Endorsed:) Order. Filed Dec. 17, 1958.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD YANOW, *Appellant*, vs. WEYERHAEUSER STEAMSHIP COMPANY, a corporation, *Appellee*.	No. 15,452

Order Vacating ORDER of November 21, 1958.

Before: DENMAN, Senior Circuit Judge, and BARNES and HAMLEY, Circuit Judges

DENMAN, Senior Circuit Judge:

On November 21, 1958, a per curiam order was filed with the Clerk of this Court granting Weyerhaeuser's Motions to recall the mandate in this case, vacate the opinion previously issued, vacate the judgment entered upon that mandate, and dismiss the appeal. This order was filed through inadvertence since it did not, at the time of filing, contain the signatures of all three judges sitting on the case. It was withdrawn for further signatures approximately one hour after filing at the request of the presiding judge, in keeping with the desires of all three judges. We thereafter determined that this order should not be refiled. We therefore now direct that the order of November 21, 1958, be withdrawn for signatures from the public records as of November 21, 1958. Since th eorder, once withdrawn for signature, became a confidential document having no official public standing, and since it has not been refiled, it may not properly be displayed, or copies thereof supplied, to non-court personnel.

/s/ William Denman
Senior Circuit Judge
/s/ Stanley N. Barnes
/s/ Frederick G. Hamley
Circuit Judges

(Endorsed) Filed
Paul P. O'Brien, Clerk
February 20, 1959

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD YANOW, *Appellant*, vs. WEYERHAEUSER STEAMSHIP COMPANY, a Corporation, *Appellee*.	No. 15,452

ORDER
On Petition for Rehearing

Before: Barnes and Hamley, Circuit Judges

The petition for rehearing in the above case is granted.

/s/ Stanley N. Barnes
/s/ Frederick G. Hamley
Circuit Judges

(Endorsed:) Filed March 10, 1959.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, November 12, 1959

Before: CHAMBERS, Chief Judge, STEPHENS, POPE, FEE, BARNES, HAMLEY, HAMLIN and JERTBERG, Circuit Judges

ORDER DIRECTING FILING OF OPINION

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD YANOW,

Appellant,

vs.

WEYERHAEUSER STEAMSHIP COMPANY, a Corporation,

Appellee.

No. 15,452

Nov. 12, 1959

Upon Motions to Recall Mandate, Vacate Judgment, and to Dismiss Appeal after an appeal from the United States District Court for the District of Oregon.

Before CHAMBERS, Chief Judge, STEPHENS, POPE, FEE, BARNES, HAMLEY, HAMLIN and JERTBERG, Circuit Judges.

POPE, Circuit Judge.

After a division of this court had heard this case and decided it upon the merits, it reversed the judgment of the district court; and after petition for rehearing filed by appellee had been rejected and its petition to the Supreme Court for certiorari had been denied, the appellee filed the present motions to recall mandate, to vacate judgment, and to dismiss the appeal. The same panel heard these motions and denied them. Upon a petition for rehearing of the motions it granted that petition, and on the recommendation of the majority of the judges of that division, the motions have been reheard by the court sitting en banc.[1]

[1]The chronology of the prior proceedings in this court is as follows:

December 19, 1956, appellant Yanow appealed to this court from a judgment upon a verdict for appellee Weyerhaeuser, defendant in the court below;

November 21, 1957, the division of the court mentioned above filed its opinion reversing the judgment and ordering a new trial.

January 17, 1958, petition for rehearing denied. Counsel for appellee then belatedly raised a question concerning an asserted lack of di-

The facts upon which the motions are predicated are as follows: The jury verdict in favor of defendant Weyerhaeuser was returned and filed October 25, 1956; judgment on that verdict, signed by the district judge, and bearing date October 25, 1956, was filed November 2, 1956. On November 5, 1956, after service of a copy thereof upon opposing counsel, counsel for Yanow, the plaintiff, who is the present appellant, filed in the court below a "motion for extension of time within which to file a motion for new trial." This was supported by an affidavit of plaintiff's counsel, and on the same day the court made an order that the time within which plaintiff might file his motion for a new trial was extended to and including November 20, 1956. A copy of the motion (not including proof of service,) of the supporting affidavit, and of the order granting the extension of time, are set forth in the margin.[2]

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versity of citizenship on which jurisdiction of the district court depended. This resulted in an amended opinion of February 21, 1958. Yanow v. Weyerhaeuser SS. Co., 9 cir., 250 F. 2d 74. Appellee then petitioned to the Supreme Court for certiorari which was denied April 28, 1958, Weyerhaeuser Stemship Co. v. Yanow, 356 U.S. 937.

October 16, 1958, appellee filed the present motions which were amended October 23, 1958; these amended motions are the matters now before the court.

[2][Title of District Court and Cause]

"Motion for Extension of Time Within Which to File a Motion for New Trial—Comes now plaintiff and moves the court for an order extending the time to and including November 20, 1956 within which to file a motion for new trial in the above entitled cause. This motion is based upon the affidavit of Nels Peterson attached hereto and made a part hereof. Dated this 2nd day of November, 1956. (signed) Peterson & Pozzi and Berkeley Lent—Nels Peterson of Attorneys for Plaintiff."

[Title of District Court and Cause].

"Affidavit—State of Oregon

County of Multnomah—ss.

I, Nels Peterson, being first duly sworn on oath depose and say that I am one of the attorneys for plaintiff in the above entitled action, and conducted trial on behalf of plaintiff; that I am informed and believe and therefore allege that Gordon Griffith, court reporter for the above entitled court, who reported the trial proceedings of the above entitled action, is unable to prepare copies of the court's instructions until on or about November 15, 1956, and such transcript is essential to the preparation of a Motion for a New Trial in the above entitled cause; that it is necessary that plaintiff be granted additional time to and

On November 20, 1956, the plaintiff Yanow served and filed a formal motion for new trial specifying and setting forth eight grounds for his motion. On December 5, 1956, a formal order denying a new trial was filed and on December 19, 1956, plaintiff served and filed his notice of appeal from the judgment and verdict for the defendant.

Appellee asserts that its motions now before us must be granted for the reason that the appeal was not taken within the time allowed by the Federal Rules of Civil Procedure. It calls attention to the provision of Rule 73(a)—". . . the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from," and notes that the judgment was dated October 25, 1956, marked filed November 2, 1956, while the notice of appeal was not filed until December 19, 1956. Appellee says that while the same rule provides that "The running of the time for appeal is terminated by timely motion made pursuant to any of the rules hereinafter enumerated," (which includes a motion for new trial under Rule 59), yet the motion for new trial filed November 20, 1956, was not timely made since Rule 59(b) provides that such a motion "shall be served not later than 10 days after the entry of the judgment", and Rule 6(b) provides that the court "may not extend the time for taking any action under Rules . . . 59(b)."

It is appellee's contention that this court never acquired jurisdiction of the appeal and that all subsequent actions, including

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including November 20, 1956, within which to file his Motion for New Trial in the above entitled cause.

FURTHER I SAYETH NAUGHT.

(signed) Nels Peterson

Subscribed and sworn to before me this 2nd day of November, 1956.

(signed) Janeth Wagenaar
Notary Public for Oregon
My Commission Expires 10-2-60."

[Title of District Court and Cause.]

"Order Extending Time—Upon a Motion of plaintiff, affidavit of counsel for plaintiff, and for cause shown,

"IT IS HEREBY ORDERED that the time within which plaintiff may file his Motion for a New Trial be and hereby is extended to and including November 20, 1956. Dated this 5th day of November, 1956. /s/ GUS J. SOLOMON, United States District Judge. [Endorsed] Filed November 5, 1956."

its judgment reversing the decision of the district court, were null and void.

It is clear that when this court first handed down its decision on November 21, 1957, and again when its amended opinion was filed on February 21, 1958, it necessarily determined that it had jurisdiction. Of course the point presently urged, namely, that the appeal was not taken within time, was not then argued or presented by either party—the point was not raised until 11 months after the first opinion when the present motions were made on October 16 and October 23, 1958. But as stated in Stoll v. Gottlieb, 305 U.S. 165, 171: "Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."[3]

That the appellee had not then raised the question is immaterial for as this court said in Leishman v. Associated Wholesale Electric Co., 9 cir., 128 F. 2d 204, 205: "The question is whether we have jurisdiction of the appeal. Though not raised by the parties, the question is here and has to be decided." Again in Guerin v. Guerin, 239 F. 2d 909, 913, we said: "This court must necessarily give first consideration to this jurisdictional point, whether or not the parties raise it." In short, the question of jurisdiction on appeal was necessarily a question before the court for decision.

Since the question of this court's jurisdiction of the appeal was thus an issue in the case, the reversal of the judgment below was a tacit determination of the court's jurisdiction and a final adjudication of that issue. If this final adjudication was erroneous, it was subject to correction upon review in a higher court, or upon rehearing in this court. But such a judgment, whether erroneous or not, becomes *res judicata*. Stoll v. Gottlieb, supra.[4]

[3] A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant." Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29; accord, O. F. Nelson & Co. v. United States, 9 cir., 169 F. 2d 833, 835.

[4] "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined." Stoll v. Gottlieb, supra, p. 172. "As held in those cases, in general the principles of **res judicata** apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties." Sunshine Coal Co. v. Adkins, 310 U.S. 381, 403. "One trial of an issue is enough. 'The principles of

When a district court rendered such a final judgment with respect to its own jurisdiction, relief therefrom is obtainable under Rule 60(b) F.R.C.P.[5] That rule has been made applicable to proceedings in this court by our Rule 8(1) which provides: "The Federal Rules of Civil Procedure, 28 U.S.C.A., whenever applicable, are hereby adopted as part of the rules of this court." It seems plain that the motions now before us must be taken to be motions made pursuant to Rule 60(b) as adopted and made applicable to this court.

When these motions were first presented to the division of the court which originally decided the case, they were denied upon the ground that "such a motion cannot be considered after the term in which the judgment becomes final." The court then relied upon authorities cited in the opinion, including O. F. Nelson & Co. v. United States, 9 Cir., 169 F. 2d 833.[6] A rehearing of that order denying the motions was granted. In its petition for that rehearing appellee correctly demonstrated that the rule stated in the Nelson case, supra, to the effect that such

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res judicata apply to questions of jurisdiction as well as to other issues, as well to jurisdiction of the subject matter as of the parties." Treinies v. Sunshine Min. Co., 308 U. S. 66, 78.

[5]Rule 60(b): "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . ."

[6]This same case is cited, supra, note 3, upon another point. Upon the question as to the expiration of the term of court, the court quoted the following statement by the Supreme Court (p. 835): "Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered."

motions could not be considered after the term in which the judgment becomes final, was no longer law. §452, Title 28, U.S.C.A., adopted by the Act of June 25, 1948, provided that: "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding." Plainly the expiration of the term has no bearing upon the power of this court to entertain or to act upon the present motions.

It is to be noted, however, that Rule 60(b) contains an express condition upon which the relief there provided for may be granted as follows: "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

If the judgment with respect to which relief is here sought were one which was truly void in the fullest sense of that term; that is to say, if it were one which was subject to collateral attack, because legally ineffective for any purpose, then it is possible that the "reasonable time" limitation might not apply. Support for that view may be found in 7 Moore's Fed. Practice, §60.25(4), p. 274, (2nd ed. 1955).[7]

But the judgment here under consideration cannot be said to be a void judgment in that sense.

Appellee suggests that the matter now presented is simple in that had the court made proper inquiry concerning the matter at the time of its decision, it would have discovered that it was without jurisdiction of the appeal. Appellee states: "It is obvious that if the court had investigated the subject matter of its own jurisdiction it would have been compelled to dismiss the

[7] "The theory underlying the concept of a void judgment is that it is legally ineffective—a legal nullity; and may be vacated by the court which rendered it at any time. Laches of a party cannot cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life. Further, it may, when appropriately called in question, be adjudged void in any collateral proceeding, and this collateral attack may be made at any time. Since a federal judgment that is void can be so collaterally attacked, and since the judgment sustaining the collateral attack would have to be given effect in a subsequent 60(b)(4) motion to set the federal judgment aside as void, the 'reasonable time' limitation must generally mean no time limit, although there may be exceptional situations where the reasonable time limitation would require diligence on the part of the movant."

appeal for lack of jurisdiction." In view of this, says appellee, "everything else which has occurred was and is a nullity . . . therefore the motions of appellee should be granted."

The problem here cannot be disposed of merely by a holding that action within the time provided by the rules is "jurisdictional." Many cases have held that the appeal time provided by Rules 59(b) and 73(a) is "mandatory and jurisdictional and cannot be extended by order of court." Edwards v. Doctors Hospital, 2nd cir., 242 F. 2d 888, 891; Howard v. Local 74, etc., 7 cir., 208 F. 2d 930, 932; Safeway Stores v. Coe, D.C. cir., 136 F. 2d 771, 774.

The difficulty is that the word "jurisdictional" has more than one meaning. As Judge Learned Hand has observed, "'Jurisdiction' is a treacherous word." Baltimore & O.R. Co. v. United States, No.Dis.N.Y., 22 F. Supp. 533, 537. Sometimes whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. Montana-Dakota Utilities Co. v. Pub. Serv. Co., 341 U.S. 246, 249. Thus it may properly be said that existence of diversity of citizenship or of the requisite amount in controversy, is a prerequisite to the jurisdiction of a federal court; but it is also clear that if the court in question determines that these requirements are satisfied, and that it has jurisdiction, it is certain that such a determination, even if demonstrably wrong, is not a nullity or a truly void judgment, for it cannot be questioned collaterally.

The distinction between cases where certain facts are strictly jurisdictional in the sense that without them the act of the court is a mere nullity, and those cases in which the facts are only *quasi*-jurisdictional, is set out in Noble v. Union River Logging Railroad, 147 U.S. 165, 173, as follows: "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common law action." [The court here lists sundry other illustrations of the rule stated, and then proceeds]: "There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked

collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal court, which, when found by such court, cannot be questioned collaterally; . . . the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy; . . . the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate; . . . the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors; . . . and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act."

Where the facts upon which jurisdiction depends are *quasi* jurisdictional in the sense here described, the determination by the court of its jurisdiction is, in the language of the case just cited, conclusive and binding in every collateral proceeding; and it matters not that the court's determination of its own jurisdiction is arrived at in error, even though the error of adjudication is apparent upon the face of the record.[8]

We are compelled to inquire whether the timeliness of the appeal is only a *quasi* jurisdictional requisite, not because we deal here with an attempted collateral attack upon the judgment,—plainly the attack here is a direct one,—but because we

[8]Abraham v. Homer, (Okl.) 226 P. 45, 47-48: "All such facts not constituting proof of the existence of the subject-matter, nor of the cause of action, but conditions precedent to the right of the court to proceed after it has acquired jurisdiction over the subject matter and of the person, are known as quasi jurisdictional facts. Their existence the court does not merely assume, but adjudicates for its jurisdiction to so do is created by the law and the jurisdictional facts. It is usually of no great importance to distinguish whether a given fact is a quasi jurisdictional fact or a fact constituting a part of a cause of action, because the court, otherwise with jurisdiction, has the same power to adjudge the existence of the former as it has of a cause of action, and its adjudication in neither regard is subject to collateral attack, even when the error of the adjudication is apparent upon the face of the record. On the making of proper distinction between quasi jurisdictional facts and jurisdictional facts often rests the determination of the validity of a judgment."

deem it essential to determine which of the six subdivisions in Rule 60(b), (footnote 5, supra), we must here apply.

Appellee apparently proceeds upon the theory that subdivision (4), "The judgment is void", is the applicable section here. We are of the opinion that it is not; we think that the lack of timeliness of the appeal resembles a lack of diversity of citizenship in that it is an irregularity in the nature of a *quasi* jurisdictional requisite.

As stated in American National Bank & T. Co. of Chicago v. Taussig, 7 cir., 255 F. 2d 765, 769: "Rule 60(b)4 applies only to void judgments. That was a case in which the jurisdictional question was whether a certain party was a resident of the United States or of an enemy country, Germany. If the latter were true, recovery was barred under the applicable Act. The court awarded a judgment against the Alien Property Custodian, and later the Attorney General moved to vacate the judgment on the ground that the court lacked jurisdiction because the party was in fact a resident of Germany. It was held that the court's judgment finding that it had jurisdiction to award it, was "not void, and the same are *res judicata* in this case." The court relied upon the statement in Treinies v. Sunshine Mining Co., supra, which we have quoted.[9]

We hold therefore that the judgment of this court was not a nullity or void, and hence that appellee's motions are not properly made under subdivision (4) of Rule 60(b), rather, they come

[9]In the early case of Des Moines Nav. Co. v. Iowa Homestead Co., 123 U.S. 552, it was claimed that the record showed there could be no jurisdiction in a circuit court of the United States to entertain a case removed from a state court since it appeared affirmatively that one of the defendants was a citizen of the same state with the plaintiff. The court said: "To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal. As the Circuit Court entertained the suit, and this court on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was, at the time of the trial in the present case in the court below, a valid and subsisting prior adjudication of the matters in controversy, binding on these parties, and a bar to this action."

within the general language of subdivision (6) referring to "any other reason justifying relief from the operation of the judgment." The significance of this conclusion is that the qualification of the rule to the effect that the motion shall be made within a reasonable time must be satisfied here if the appellee is to prevail.

Recently, in the case of Patapoff v. Vollstedt's, Inc., 267 F. 2d 863, 866, this court had occasion to consider and apply subdivision (6) of Rule 60(b) holding that under the circumstances of that case the relief prayed for by the moving party should have been granted under that subdivision. In reaching that conclusion this court took pains to make note that the applicant in presenting her motion "made that showing very promptly." There the motion to vacate, under the Rule, was made 10 days after the order against which it was directed.

It is clear that appellee was required to present these motions within a reasonable time. It is equally clear that appellee's delay of almost 11 months after the date of the original decision in this case, (November 21, 1957 to October 16, 1958) was such that it cannot be said that the motion was made within a reasonable time. (This was a substantially longer time than the eight months which we held to be an unreasonable time in Stafford v. Russell, 9 cir., 220 F. 2d 853, 855.) During this interval appellee was calling upon the court to consider the question of jurisdiction of the trial court and its efforts in this direction led to the filing of the amended opinion. It imported a new attorney who noted his appearance here January 22, 1958. It proceeded to petition for certiorari and at all those times counsel must have had occasion to consider, or have in mind, the basis for jurisdiction not only in the court of first instance, but in this court. It had frequent occasion to sift the record. Seemingly it never occurred to the appellee to present the jurisdictional matter now urged until October 16, 1958. These are among the circumstances which we have in view in holding that more than a reasonable time had elapsed.

We have assumed for the purpose of this decision that the record before us showed upon its face that there was not a timely appeal taken to this court. As we have above suggested, this would indicate that the court's determination of its own jurisdiction to entertain the appeal was an erroneous one, but it is insufficient to show that it was a void one.

What we have said, upon the basis of that assumption, sufficiently disposes of this matter. However, there is another, alternative view of the facts and the law of this case which while unnecessary to this decision, nevertheless points to an additional basis for our action here. There is a line of decisions in the federal courts which would indicate that there exists here at least a colorable basis for a holding that the appeal was taken within time.

Under Rule 73(a) "The running of the time for appeal is terminated by a timely motion made pursuant to . . . Rule 59." Where such a motion for new trial has been made and is denied, the appellant has 30 days after the entry of the order denying a new trial, to give notice of appeal. It is true that the formal motion for new trial here was not made until November 20, 1956. Prior to that time, however, the appellant filed the motion papers set forth in footnote 2, supra. In these he moved the court for an order "extending the time to and including November 20, 1956 within which to file a motion for new trial in the above entitled case." Of course no grounds for the anticipated motion for new trial are stated, although the affidavit in support thereof suggested that counsel expected his motion to be based upon some matter relating to the court's instructions.

However, there is a considerable body of authority indicating that in determining whether an attempted appeal has been accomplished, most informally drawn papers and improperly labeled documents have been held sufficient to accomplish the apparent objective of taking an appeal or of making a motion for a new trial. Thus a petition for rehearing has been held equivalent to a motion for new trial. Fraser v. Doing, D.C.cir., 130 F. 2d 617, The Astorian, 9 cir., 57 F. 2d 85, 87; a waiver of notice of appeal by the appellee, when filed, has been held an acceptable substitute for a regular notice of appeal, Crump v. Hill, 5 cir., 104 F. 2d 36;[10] a petition for mandamus was accepted

[10]In Federal Deposit Ins. Corp. v. Congregation Poiley Tzedeck, 2 cir., 159 F. 2d 163, 166, Judge Hand commented upon this case as an illustration of compliance with what he there described as the minimum requirements of a notice of appeal under Rule 73(a) as follows: "[S]ome paper must be filed in at least one court or the other, to constitute a notice of appeal. . . . The least requirement, which will be tolerable, is that some paper shall be accessible in the records of a court upon which both judges and parties can rely."

as a sufficient notice of appeal notwithstanding it was filed in the appellate rather than the district court. Jordan v. United States District Court, D.C. cir., 233 F. 2d 362, 365;[11] an application made in the court of appeals for leave to appeal in forma pauperis has been held "an unequivocal notification of intention to appeal and therefore a 'notice of appeal' sufficient to give this court jurisdiction." Blunt v. United States, D.C. cir., 244 F. 2d 355, 359. See in accord Burdix v. United States, 9 cir., 231 F. 2d 893, 894; Roth v. Bird, 5 cir., 239 F. 2d 257.[12] Our decision in Mondakota Gas Co. v. Montana-Lakota Utilities Co., 194 F.2d 705, 706, is out of line with those cases, but it was expressly disapproved in Parissi v. Telechron, 349 U.S. 46, 47. More in line with the presently prevailing view is Cutting v. Bullerdick, 9 cir., 178 F. 2d 774.[13]

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[11]This case is interesting in that the Supreme Court granted certiorari, 352 U.S. 904, something it would hardly have done had it not been satified with the jurisdiction of the court of appeals.

[12]Cf. Lemke v. United States, 346 U.S. 325, 326, in which the Supreme Court held that a notice of appeal filed before judgment was entered was not so premature as to defeat appellate jurisdiction because it was still on file when the proper date arrived, and at that time gave full notice of appeal. Hence it was an irregularity not affecting substantial rights under Rule 52(a) of the Criminal Rules. (Cf. Rule 61, F.R.C.P.: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties") See also Boyden v. Webb, 9 cir., 208 F. 2d 201, 203, holding that on appeal from an order denying habeas corpus the filing in the court of appeals of an application for a certificate of probable cause within the 30 day period mentioned in Rule 73(a) presented a timely appeal. Also in accord with Blunt v. United States, supra, are Gerringer v. United States, D.C. cir., 213 F. 2d 346, West v. United States, D.C. cir., 222 F. 2d 774, all cases in which there was held to be a sufficient notice of appeal although the paper was labeled a motion for leave to appeal in forma pauperis and in each case the document was filed in the wrong court.

[13]In that case the paper filed, and held an adequate notice of appeal, recited: "You will please take notice that on Friday the 6th day of May, 1949, at ten o'clock A.M. of said day . . . the defendants will move the Court for an order staying all execution proceedings on the part of the plaintiffs in the above-entitled action on the grounds that the defendants feeling themselves aggrieved by the judgment made and entered on the 8th day of April, 1949, in the above entitled cause, desire to post a supersedeas bond and perfect an appeal." While the court based it holding on the fact that the law relating to appeals from Alaska was uncertain, yet it said: "The rule of strict construc-

It is thus apparent that had this court been presented with a motion to dismiss the appeal on or before the date the case was first argued on its merits, it might well have noted the decisions we have just mentioned,—decisions holding that an attempted appeal may be held to be effective and timely notwithstanding the papers filed are given the wrong names, do not use the word "appeal", are filed in the wrong court, or otherwise fail strictly to conform to the language of the rules. Those cases in principle would support a holding that the motion filed November 5, 1956 could be treated as a motion for a new trial even though it was not labeled as such, and failed to state the grounds for the intended motion. Thus, it might satisfy the requirements of Rule 59(b) relating to service not later than 10 days after the entry of the judgment. Under such a holding that motion would suspend the running of the time for appeal under the provisions of Rule 73(a).

The rationale of the cases relating to informal or irregular appeals is that notwithstanding the papers filed were inaptly worded, or labeled, or even failed to use the word "appeal", or were filed in the wrong court, yet they sufficed to show the party intended to appeal. Similarly, the application for time in which to move for a new trial gave notice of appellant's intent to so move, and was an initiation of efforts to that end.

This motion was served on November 2, 1956. We have noted that the judgment was dated October 25, 1956 and filed November 2, 1956. If we were to assume that the "entry" of the judgment occurred on October 25 and the motion was made on November 5, 1956, the date of its filing, this would be within the 10 days specified, for November 4 was a Sunday.

It is true that the motion for an extension of time within which to file a motion for new trial stated no grounds for which a new trial would be sought; but the fact that this motion, considered as an inartificially drawn motion for new trial was so defective that it could not properly be granted, would not serve to render it non-existent. This court has held that in order to suspend the running of the 30 day appeal period allowed by Rule 73(a) a motion for new trial need not be granted or even be grantable. Thomas Day

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tion does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited infra."

Co. v. Doble Laboratories, 9 cir., 41 F. 2d 51, 52;[14] The Astorian, supra.

It is unnecessary here to determine, and we do not purport to decide, whether the court would have been correct in holding, had the matter arisen upon a motion to dismiss the appeal, that the motion for an extension of time within which to move for a new trial should be treated as itself a motio for new trial. All that we here note is that a decision to that effect would at least have had a colorable basis in the decisions.[15]

If the motion filed November 5, 1956, may properly be treated as itself a motion for new trial, the question arises as to what effect, if any must be given the formal motion for new trial of November 20, 1956. It may be considered an attempted amendment or enlargement of the earlier motion. Of course, the addition then of new grounds for the motion would be ineffective, but as suggested by our decisions in Thomas Day Co. v. Doble Laboratories, and The Astorian, supra, the motion though still ineffective, was not necessarily non-existent. This means that when the formal motion was denied on December 5, 1956, this was the date of denial from which time the 30 days would be computed, making the December 17, 1956 notice of appeal a timely one.

Our disposition of this case makes it unnecessary to consider whether, on the facts shown, there is here "any . . . reason justifying relief" within the meaning of subdivision (6) of Rule 60(b); that is to say, whether action by us under this "other reason" clause would be an exercise of a power there granted. That clause, in the language of Mr. Justice Black in Klapprott v. United States, 335 U.S. 601, 614, "vests power in courts adequate to enable them to vacate judgments whenever such action is

[14] "To have the effect of tolling the statutory limitation for appeals it is, of course, not essential that the petition for rehearing be well taken, and it would seem to follow that if it is defective in form or substance and is denied for that reason it would still have such effect."

[15] In arriving at a conclusion that such a colorable basis could be found, we have relied upon the decisions of this court in Thomas Day Co. v. Doble, supra, and The Astorian, supra. Even if those decisions were wrong, the judgments entered thereon were not void. We note that there are cases which disagree with those decisions, as for instance, Fine v. Paramount Pictures, 7 cir., 181 F. 2d 300. On the other hand, Kelly v. Pennsylvania Railroad Company, 3 cir., 228 F. 2d 727, would appear on principle to support the view taken in the decisions of this court just mentioned.

appropriate to accomplish justice."[16] We do not reach that question here.

If relief were to be granted under Rule 60(b) it must be applied for under the provisions of subdivision (6) of that Rule. Hence, the application must be made within a reasonable time. As we hold that such application was not made within a reasonable time, the motions must be denied.

IT IS SO ORDERED.

Judge Fee did not participate in the decision of this case.

(Endorsed:) Opinion. Filed Nov. 12, 1959.

Paul P. O'Brien, Clerk.

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[16]The suggestion on that question proceeds as follows: The motions here, as in the case of similar motions in the District Court under 60(b)(6), are addressed to the "sound legal discretion of the . . . court," Independence Lead Mines Co. v. Kingsbury, 9 cir., 175 F. 2d 983, 988, Stafford v. Russell, 9 cir., supra. When a motion is presented under subdivision (6) the question is whether the vacating of a judgment "is appropriate to accomplish justice." Klapprott v. United States, supra; L. M. Leathers Sons v. Goldman, 6 cir., 252 F. 2d 188, 190. Tacitly holding it had jurisdiction this court held appellant entitled to a new trial. To deny him that new trial would not "accomplish justice."

Appendix B

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ." [U. S. Constitution, Art. VI, Clause 2.]

"No person shall . . . be deprived of . . . property, without due process of law; . . ." [U. S. Constitution, Amendment V.]

"(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

"(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States." [Title 18, U.S.C., §2071.]

"(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.

"(b) Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court." [Title 28, U.S.C., §43.]

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum." [Title 28, U.S.C., §46.]

"All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.

"The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding." [Title 28, U.S.C., §452.]

"The records of district courts and of courts of appeals shall be kept at one or more of the places where court is held. Such places shall be designated by the respective courts except when otherwise directed by the judicial council of the circuit. . . ." [Title 28, U.S.C., §457.]

"(a) Each court of appeals may appoint a clerk who shall be subject to removal by the court." [Title 28, U.S.C., §711(a).]

"Each clerk of the court and his deputies shall take the following oath or affirmation before entering upon their duties: 'I, ..., having been appointed ....., do solemnly swear (or affirm) that I will truly and faithfully enter and record all orders, decrees, judgments and proceedings of such court, and will faithfully and impartially discharge all other duties of my office according to the best of my abilities and understanding. So help me God.'" [Title 28, U.S.C., §951.]

"The clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court." [Title 28, U.S.C., §956.]

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By a writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ." [Title 28, U.S.C. §1254(1).]

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." [Title 28, U.S.C., §1291.]

"The Supreme Court and all courts established by Acts of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." [Title 28, U.S.C., §2071.]

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." [Title 28, U.S.C., §2072.]

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." [Title 28, U.S.C., §2106.]

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an

action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

• • • •

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree." [Title 28 U.S.C., §2107.]

"(a) Service: When Required. Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby. . . ."

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"(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter." [Rule 5, F.R.C.P.]

"(b) Enlargement. When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as ex-

tended by a previous order . . .; but it may not extend the time for taking any action under rules . . . 59(b), . . . and 73(a) . . ., except to the extent and under the conditions stated in them."

* * * * *

"(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

"(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period." [Rule 6, F.R.C.P.]

"(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." [Rule 7, F.R.C.P.]

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .

"(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment." [Rule 59, F.R.C.P.]

"(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . .

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . . Writs of coram nobis, coram vobis; audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." [Rule 60, F.R.C.P.]

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from . . . and except that upon a showing of excusable neglect based upon a failure of the party to learn of the entry of the judgment the district court may in any action extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: . . . denying a motion for a new trial under Rule 59.

"A party may appeal from a judgment by filing with the district court a notice of appeal. . . ." [Rule 73. F.R.C.P.]

"The clerk shall keep a book known as 'civil docket' . . . and shall enter therein each civil action to which these rules are applicable. . . . All papers filed with the clerk, all process issued and return made thereon, all appearances, orders, verdicts and judgments shall be noted chronologically in the civil docket assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court. . . . The notation of an order or judgment shall show the date the notation is made. . . ."
[Rule 79, (a), F.R.C.P.]

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 681

WEYERHAEUSER STEAMSHIP COMPANY,
a Corporation,
Petitioner

vs.

HAROLD YANOW,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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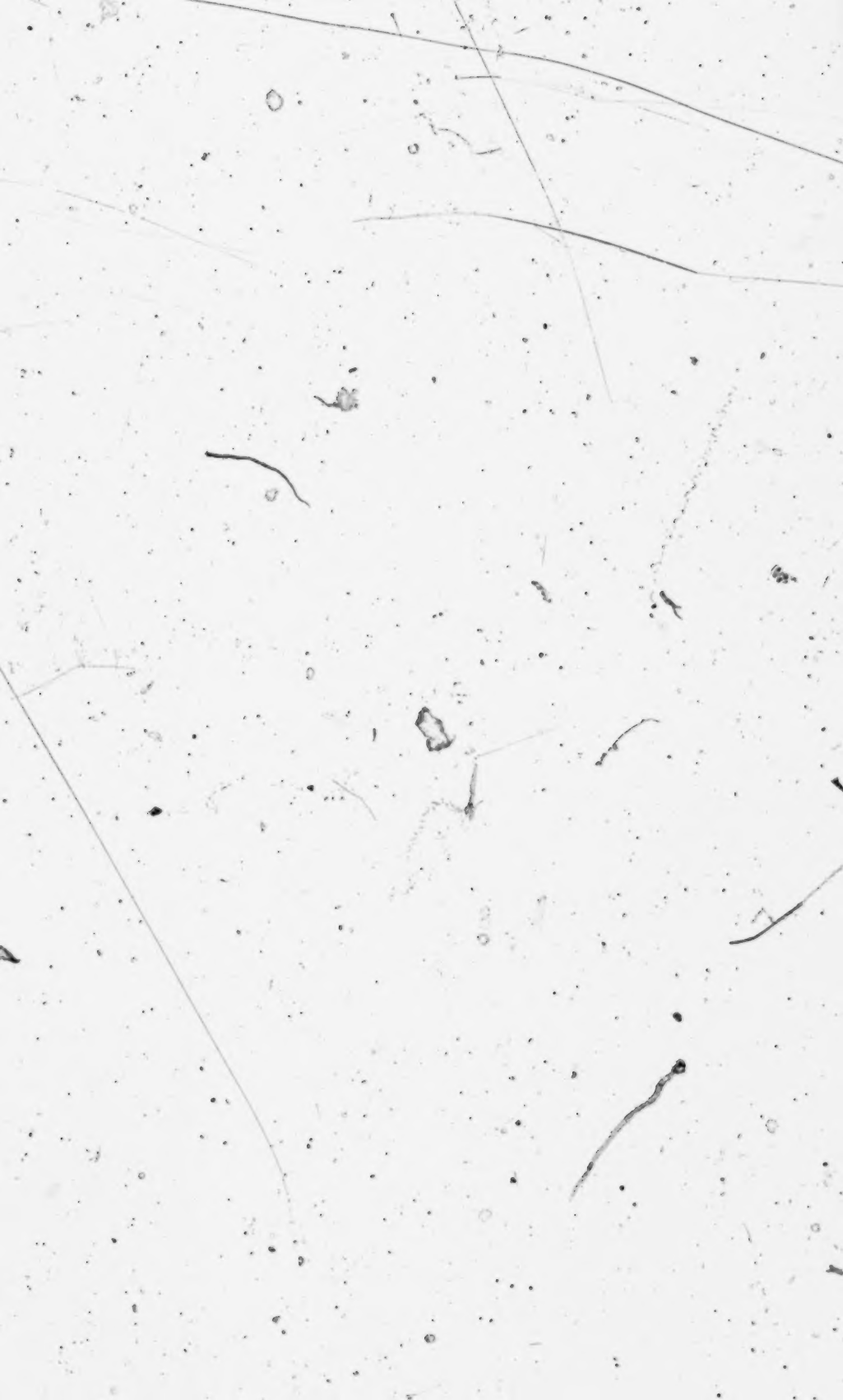

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BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Rule 23 (1) (c) of the rules of this Court provide that the questions presented should be "expressed in the terms and circumstances of the case but without unnecessary detail."

Reference is made to questions A, D and E which are not phrased in terms of the facts of this case but which appear to be purely hypothetical.

STATEMENT OF THE CASE

The jurisdiction of the District Court was based upon a diversity of citizenship and the required amount in controversy.

This action was commenced in the Circuit Court of the State of Oregon and removed by petitioner to the United States District Court for the District of Oregon. On October 25, 1956, the jury returned a verdict in favor of petitioner and against respondent and judgment was entered thereon. On November 5, 1956 respondent moved the District Court for an extension of time in which to file his motion for a new trial and filed in support thereof an affidavit, the full text of which is set forth in the margin of the Court of Appeals' opinion of November 12, 1959 (page 17, appendix, Petition for Certiorari). In this affidavit, attorney for respondent informed the Court that the court reporter was unable to prepare copies of the Court's instructions until November 15, 1956 and that said transcript was essential to the preparation of the motion for a new trial.

On the same day, the District Court entered an order extending the time in which to file the motion for a new trial to and including November 20, 1956 (R. 15).

On November 20, 1956 the respondent served and filed a motion for a new trial challenging, among other things, certain instructions of the Court (R. 15). On December 15, 1956 after argument in which counsel for petitioner participated, the District Court denied the motion for a new trial (R. 17).

On December 19, 1956 respondent filed its notice of appeal and thereafter on November 21, 1957 the Court of Appeals reversed and remanded for a new trial, holding that one of the Court's instructions was erroneous and prejudicial to respondent.

After a petition for rehearing had been filed by petitioner, the Court of Appeals amended its opinion by including therein an excerpt from the verified petition of petitioner showing such diversity of citizenship between the parties as to give the District Court jurisdiction.

In March of 1958 the petitioner filed a petition for writ of certiorari with this Court. This petition was denied on April 28, 1958. *Weyerhaeuser Steamship Company v. Yanow*, 356 US 935.

On May 5, 1958 the Court of Appeals issued its mandate and on October 16, 1958 petitioner served and filed its motion for a recall of said mandate (R. 226). The Court of Appeals on December 17, 1958 denied the motion and petitioner filed a petition for rehearing. This was granted by the court on March 10, 1959 and the matter was heard by the Court of Appeals *en banc* on June 29, 1959.

The court reaffirmed its earlier decision in an opinion dated November 12, 1959.

Thereafter, on February 3, 1960 the petitioner again filed a petition for certiorari.

On page 13 of said petition, petitioner asserts that the matter has not been set for retrial in the District

Court and that the Chief Judge thereof is aware of the pending petition and will take no action unless it is denied.

Respondent has not been advised of any such contact between attorneys for petitioner and the chief judge of the District Court for the District of Oregon. Neither has he been advised that the Court will not reset the case for trial until the petition for certiorari is acted upon. Petitioner believes that the mandate is still on the record of the District Court and that there is no reason why the case should not be set for trial in due course.

ARGUMENT

The burden of petitioner's argument is that the Court of Appeals erred in holding that its motion to recall the mandate was not timely made. We believe that this is a matter within the sound discretion of the Court of Appeals.

The opinion of the court below makes very clear its reasons for holding that the petitioner's motion was not timely. On page 25 of appendix A to the petition, the Court of Appeals in its opinion points out that petitioner delayed filing its motion almost eleven months from the original decision in the case (November 21, 1957 to October 16, 1958) and that during this time it called upon the Court of Appeals to consider the question of jurisdiction of the trial court and that an amended opinion was filed as a result. Petitioner imported a new attorney into the cause and applied for certiorari in this Court and "at all those times counsel must have had occasion to consider,

or have in mind, the basis for jusidiction not only in the court of first instance, but in this Court. It had frequent occasion to sift the record. Seemingly it never occurred to the appellee to present the jurisdictional matter now urged until October 16, 1958. These are among the circumstances which we have in view in holding that more than a reasonable time had elapsed."

The Court of Appeals further carefully considered the merits of petitioner's argument that it had no jurisdiction on the appeal and that its judgment was therefore void. It ruled against petitioner on logical and sound grounds.

Respondent would go further and point out that although the Court of Appeals did not find it necessary to reach this point, it may well have ruled for respondent on the ground that the motion for an extension of time in which to file for a new trial was tantamount to a motion for a new trial itself. Certainly, it could be logically held that the district court had the power to relieve appellant from the running of time in which to file his appeal if one of its own arms, namely the court reporter, was unable to function, and, as in this case, produce a transcript of the instructions as given by the court so that a timely motion for a new trial could be made.

The spirit of the rules of civil procedure does not, it seems to us, impose upon a litigant a penalty for a situation caused by a failure of an employee of the court to perform a ministerial act in a timely fashion.

Counsel has searched diligently for a similar case but is unable to find one which would be of assistance to the Court.

However, counsel for respondent does suggest to the Court that the order of the Court of Appeals denying petitioner's motion to recall its mandate may not be an appealable order under the judiciary act.

As for petitioner's other contentions relative to alleged irregularities of the Court of Appeals, we do not think this is a serious question for the reason that it would seem perfectly appropriate for any court to correct a clerical error as was done in this case. To impute sinister motives to judges and to a Court of Appeals' clerk of long standing is, it seems to us, somewhat far-fetched.

In any case, respondent does not believe that any substantial question affecting the administration of the courts has been raised by the petition for certiorari.

CONCLUSION

Respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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Respondent.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION.

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Petitioner replies to Respondent's Brief in Opposition as follows:

1. "Respondent does suggest to the Court that the order of the Court of Appeals denying petitioner's motion to recall its mandate may not be an *appealable* order under the judiciary act." (P. 6, R. B. in Opposition.)

Respondent overlooks that plain fact that no *appeal* is involved. This is a proceeding with respect to a writ of certiorari. Petitioner's citation of Art. III, Sections 1 and 2; and Title 28 U. S. C., Sections 1254 (1) and 2106 (Pet.

p. 3, ¶ (b) (iii)) sufficiently answers this contention of respondent.

2. "Certainly, it could be logically held that the district court had the power to relieve appellant from the running of time in which to file his appeal if one of its own arms, namely the court reporter, was unable to function, and, as in this case, produce a transcript of the instructions as given by the court *so that* a *timely* motion for a new trial *could be made*." (P. 5, R. B. in Opposition.)

No citation of any statute, rule or decision of any court is or could be mentioned in support of this insupportable assertion.

All respondent was required to do in order to preserve his right to appeal after the expiration of thirty days from the date of the entry of the judgment in the district court was to *serve* a motion for a new trial not later than ten days after the entry of the judgment. It could have been *filed* within a reasonable time after such service.

Rule 51, FRCP, provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Respondent's counsel had a copy of each instruction which had been proposed in written form by *each* of the parties. He knew *before* the case was submitted to the jury which of these instructions had been given or refused

or he could not have stated his objections as is required by Rule 51.

A simple motion for a new trial would have sufficed. "Plaintiff hereby moves the court for an order granting a new trial upon the ground that the court committed prejudicial error in the giving of instructions at the request of the defendant and in the refusal to give instructions at the request of the plaintiff." He did not prepare or serve such a motion although it could have been dictated and typed in less than 30 minutes.

There is only *one* ground upon which a *district court* may *extend* the time for filing a notice of appeal. It is succinctly stated in Title 28 U. S. C. Section 2107, paragraph 4, as follows: "The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect *based on failure of a party to learn of the entry of the judgment, order or decree.*" This provision is not relevant to the case at bar.

CONCLUSION.

It is again respectfully contended that Petitioner is entitled to affirmative relief as prayed for in its petition for a writ of certiorari.

Dated, San Francisco, California,
March 2, 1960.

Respectfully submitted,
LASHER B. GALLAGHER,
Counsel for Petitioner.